

# San Francisco Law Library

436 CITY HALL

No. 150448

---

## EXTRACT FROM RULES


Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.

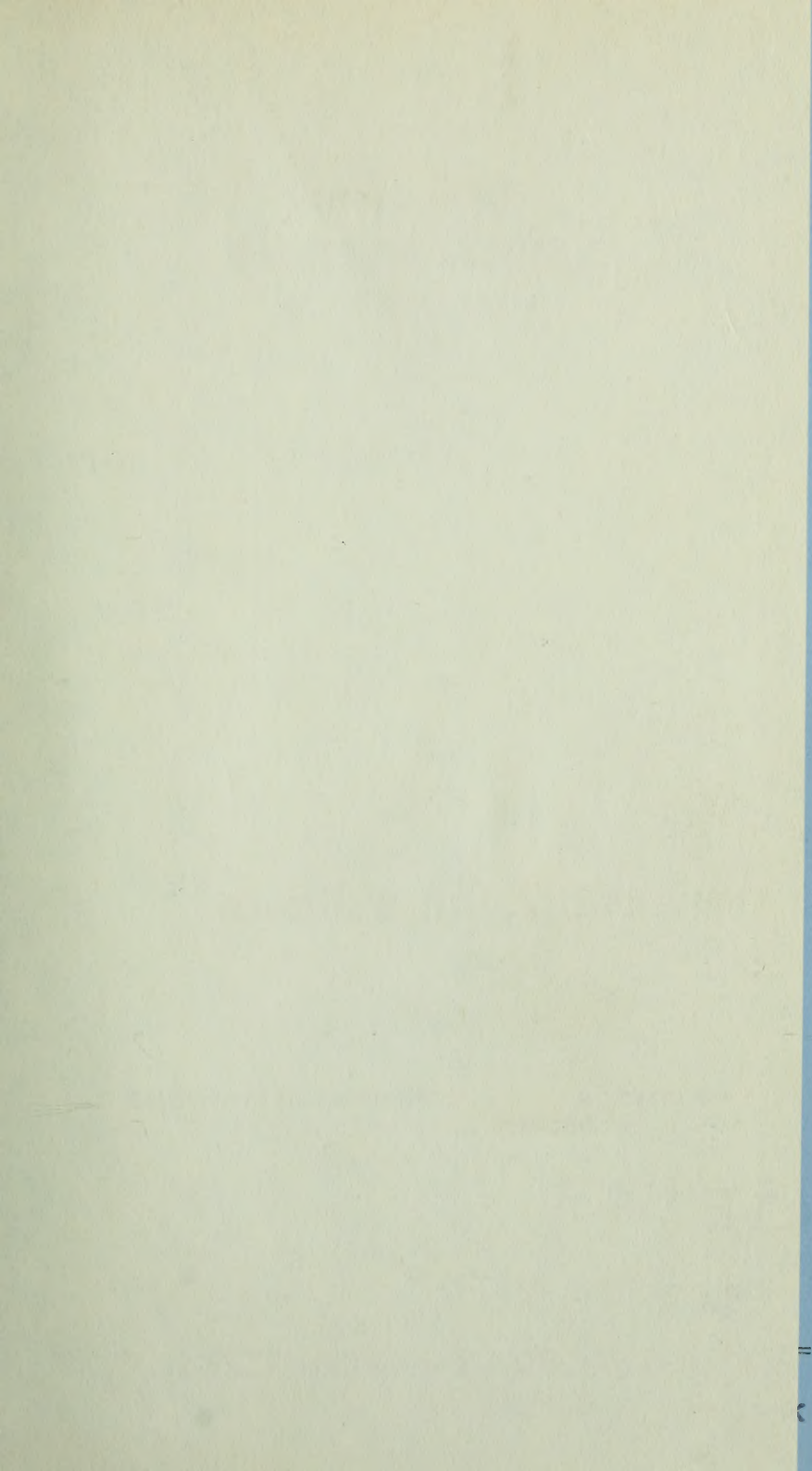






Digitized by the Internet Archive  
in 2010 with funding from  
Public.Resource.Org and Law.Gov









2708  
No. 13061

---

**United States  
Court of Appeals**  
for the Ninth Circuit.

---

EDMUND E. SUNDWALL,

Appellant,

VS.

PACIFIC FAR EAST LINE, INC., a Corpora-  
tion, Sued Herein as PACIFIC FAR EAST  
STEAMSHIP COMPANY,

Appellee.

---

**Apostles on Appeal**

---

**Appeal from the United States District Court for the  
Northern District of California,  
Southern Division.**

**FILED**

NOV - 7 1951





No. 13061

---

**United States  
Court of Appeals**  
for the Ninth Circuit.

---

EDMUND E. SUNDWALL,

Appellant,

vs.

PACIFIC FAR EAST LINE, INC., a Corpora-  
tion, Sued Herein as PACIFIC FAR EAST  
STEAMSHIP COMPANY,

Appellee.

---

**Apostles on Appeal**

---

**Appeal from the United States District Court for the  
Northern District of California,  
Southern Division.**





# INDEX

---

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer of Defendant.....	7
Certificate of Clerk to Record on Appeal.....	145
Citation on Appeal.....	23
Cost Bond on Appeal.....	24
Designation of Record Material to the Con- sideration of Appeal.....	149
Final Decree .....	17
Findings of Fact and Conclusions of Law.....	11
Libel in Personam.....	3
Names and Addresses of Proctors.....	1
Notice of Appeal.....	19
Order Allowing Appeal.....	22
Order Extending Time Within Which to Docket Apostles on Appeal.....	26
Petition for Appeal.....	20
Reporter's Transcript .....	27

Witnesses, Libelant's:

Bricca, Dr. Constantine R., Jr.

—direct .....	68
—cross .....	82

## INDEX

PAGE

## Witnesses, Libellant's—(Continued) :

## Brunsch, Walter E.

—direct .....	106
—cross .....	108
—redirect .....	116

## Sundwall, Edmund E.

—direct .....	30
—cross .....	48, 59, 95
—redirect .....	101
—recross .....	102

## Witness, Respondent's:

## Boyle, Samuel F. Sr.

—direct .....	117
—cross .....	124
—redirect .....	138, 143
—recross .....	139, 144

## Statement of Points Upon Which Appellant

Intends to Rely.....	148
----------------------	-----

Stipulation and Order.....	151
----------------------------	-----

## NAMES AND ADDRESSES OF PROCTORS

BELLI, ASHE & PINNEY,

240 Stockton St.,

San Francisco 8, Calif.,

Proctors for Appellant.

DORR, COOPER & HAYS,

1505 Mechants Exchange Bldg.,

San Francisco 4, Calif.,

Proctors for Appellee.





In the Southern Division of the United States  
District Court for the Northern District of  
California

No. 25546 G

EDMUND E. SUNDWALL,

Plaintiff,

vs.

PACIFIC FAR EAST STEAMSHIP COMPANY,  
FIRST DOE and SECOND DOE,

Defendants.

**LIBEL BY SEAMAN UNDER SPECIAL RULE  
FOR SEAMEN TO SUE WITHOUT PRE-  
PAYMENT OF COSTS OR FEES FOR EN-  
FORCEMENT OF LAWS OF THE UNITED  
STATES, PROTECTION OF HEALTH AND  
SAFETY AT SEA**

To the Honorable Judges of the District Court of  
the United States for the Northern District  
of California:

Now comes Edmund E. Sundwall and as and for  
his libel in personam brought pursuant to the pro-  
visions of the Jones Act, 33 Merchant Marine Act  
of June 5, 1920, 46 U.S. Code 688, and other good  
law, equity and admiralty, alleges as follows:

**I.**

That at all times herein mentioned, Pacific Far  
East Steamship Company, First Doe and Second  
Doe were corporations doing business within the

jurisdiction of this court and owned, operated, controlled, supervised and managed that certain ship, the SS Iran Victory.

## II.

That at all times herein mentioned, the libellant was a seaman employed by respondents and acting in the scope of his employment aboard the said SS Iran Victory.

## III.

That on or about the 28th day of April, 1949, while the said SS Iran Victory was on the high seas, respondents so negligently and carelessly maintained, managed and controlled said vessel as to cause oil, which libellant was then and there engaged in transferring from a drum to a five-gallon can, to splash upon and enter libellant's left eye; that by reason thereof libellant sustained the damages and injuries hereinafter set forth.

## IV.

That by reason of the premises, and as a proximate result thereof, libellant sustained permanent and severe injuries to his said left eye, and is informed and believes, and upon such information and belief alleges that he may lose the sight thereof.

## V.

That by reason of said injuries, libellant was confined to the hospital and his house for a long period of time; has suffered, and will suffer, pain, agony and mental anguish; has lost and will lose large sums of money which he otherwise would have

earned as wages; has been permanently injured, and will be unable to pursue his usual occupation because of permanent injuries, all to his damage in the sum of Sixty-five Thousand Dollars (\$65,000.00).

## VI.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States of America and of this Honorable Court.

As and for a Second, Separate and Distinct Cause of Action, Libellant Further Alleges:

### I.

Incorporates by reference the allegations contained in Paragraphs I, II, IV, V and VI of libellant's First Cause of Action as if the same were set forth at length herein.

### II.

That on or about the 28th day of April, 1949, respondents did maintain said vessel and its gear in an unseaworthy condition in that they failed to provide pumps for the transfer of oil from an oil drum to a five-gallon can; that while libellant was engaged in transferring oil pursuant to orders given him by his supervisors aboard said vessel, the oil was caused to and did splash upon and enter his left eye; that by reason of the premises libellant sustained the injuries and damages herein set forth.

Wherefore, libellant prays that respondents be required to appear and answer all and singular the

matters aforesaid and that libellant may have a decree for damages in the amount of Sixty-five Thousand Dollars (\$65,000.00), together with costs and disbursements of this action.

/s/ VAN H. PINNEY,  
Proctor for Libellant.

State of California,  
City and County of San Francisco—ss.

Edmund E. Sundwall, being first duly sworn, deposes and says:

That he is the libellant in the above-entitled action; that he has read the foregoing libel, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on his information and belief and as to those matters he believes it to be true.

/s/ EDMUND E. SUNDWALL.

Subscribed and sworn to before me this 16th day of October, 1949.

[Seal] /s/ ABRAHAM RABINOWITCH,  
Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Filed November 17, 1949.



[Title of District Court and Cause.]

ANSWER OF DEFENDANT, PACIFIC  
FAR EAST LINE, INC.

To the Honorable, the Judges of the Above-Entitled  
Court:

The answer of Pacific Far East Line, Inc., a corporation, sued herein as Pacific Far East Steamship Company, to the libel herein admits, denies and alleges as follows:

I.

Answering the allegations of article I of said libel, admits that defendant Pacific Far East Line, Inc., was at all times therein mentioned a corporation doing business within the jurisdiction of this court and operated, controlled, supervised and managed the steamship Iran Victory. Denies each and every, all and singular, the remaining allegations of said article I.

II.

Answering the allegations of article II of said libel, denies each and every, all and singular, the allegations contained therein, except that it is admitted that plaintiff was a seaman employed by the defendant on board the steamship Iran Victory.

III.

Denies each and every, all and singular, the allegations contained in article III of said libel.

IV.

Denies each and every, all and singular, the allegations contained in article IV of said libel.

## V.

Denies each and every, all and singular, the allegations contained in article V of said libel, particularly denies that plaintiff has been damaged in the sum of \$65,000.00, or in any sum or at all by reason of any alleged injuries as alleged in said libel.

## VI.

Denies each and every, all and singular, the allegations of article VI of said libel, except that the admiralty and maritime jurisdiction of this court is admitted.

Further answering and as an affirmative defense to the libel herein, defendant, Pacific Far East Line, Inc., alleges as follows:

## I.

Upon information and belief that if plaintiff was injured as alleged in said libel while on board the steamship Iran Victory, said plaintiff was negligent and careless and failed to take proper or any precautions for his own safety and that his said negligence and carelessness and failure to take proper precautions was a proximate cause of said alleged injuries and of the alleged damages and proximately contributed thereto.

Answering the second, separate and distinct alleged cause of action, defendant, Pacific Far East Line, Inc., admits denies and alleges as follows:

## I.

Answering the allegations of article I of said

second, separate and distinct alleged cause of action, refers to and by such reference incorporates herein the denials, admissions and allegations of said defendant's foregoing answer to articles I, II, IV, V and VI of plaintiff's first alleged cause of action, and makes the same defendant's answer to the allegations of article I of plaintiff's second, separate and additional alleged cause of action.

## II.

Denies each and every, all and singular, the allegations contained in article II of said second, separate and distinct alleged cause of action.

Further answering and as an affirmative defense to the second, separate and distinct alleged cause of action, defendant, *Pacific Far East Line, Inc.*, alleges as follows:

## I.

Upon information and belief, that if plaintiff was injured as alleged in said libel while on board the steamship *Iran Victory*, said plaintiff was negligent and careless and failed to take proper or any precautions for his own safety and that his said negligence and carelessness and failure to take proper precautions was a proximate cause of said alleged injuries and of the alleged damages and proximately contributed thereto.

Wherefore defendant, *Pacific Far East Line, Inc.*, prays that plaintiff take nothing by his libel herein, that the same be dismissed with costs to defendant

and that said defendant may have such other and further relief as may be just and equitable in the premises.

DORR, COOPER & HAYS,  
Proctors for Defendant,  
Pacific Far East Line, Inc.

United States of America,  
State of California,  
City and County of San Francisco—ss.

J. P. Wagner, being first duly sworn, deposes and says:

That he is an officer, to wit, Vice President of Pacific Far East Line, Inc., a corporation, one of the defendants in the above-entitled action and makes this verification for and on behalf of said defendant; that the same is true of his own knowledge, except as to those matters which are therein stated upon information and belief and that as to those matters, he believes it to be true.

/s/ J. P. WAGNER.

Subscribed and sworn to before me, this 23rd day of January, 1950.

[Seal] /s/ EDITH GOEWBY,  
Notary Public in and for the City and County of  
San Francisco, State of California.

My Commission Expires Dec. 24, 1952.

Receipt of copy acknowledged.

[Endorsed]: Filed January 23, 1950.



[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on the 14th day of February, 1951, in the above-entitled court, Honorable Edward P. Murphy, United States District Judge, presiding, and the trial continued until February 15, 1941; Van H. Pinney, Esq., of the firm of Belli, Ashe & Pinney, proctors for libelant, appearing for the libelant, and Jay T. Cooper, Esq., of the firm of Dorr, Cooper & Hays, proctors for respondent, Pacific Far East Line, Inc.; appearing for respondent, Pacific Far East Line, Inc.; and the cause having been submitted for decision, the Court makes the following findings of fact and conclusions of law:

### I.

That at all times mentioned in said cause, respondent, Pacific Far East Line, Inc., was a corporation doing business within the jurisdiction of this Court and owned, operated, controlled and managed the steamship Iran Victory.

### II.

That at all times mentioned in said cause, libelant was a seaman employed by respondent, Pacific Far East Line, Inc., and was acting in the scope of his employment on board the steamship Iran Victory.

### III.

That on the 28th day of April, 1949, while the Iran Victory was on the high seas, libelant, while

working in the course of his employment, was, together with two other seamen, engaged in taking oil from an iron oil drum on the main deck and putting it in a five-gallon bucket—this for the purpose of painting. That at said time some of the oil splashed in libelant's face and some of the drops got into libelant's left eye. That at the time this occurred, the oil drum was being tipped so that the oil ran out of the bung and into the bucket which libelant was holding. That libelant took the bucket of oil to the place where it was to be used and thereafter washed his face and eye. That libelant then returned to work and worked during the rest of his watch. At some subsequent time (the evidence does not establish definitely whether it was the following day or several days thereafter), libelant went to the purser for attention, and the purser washed out libelant's eye with an eye cup. That libelant continued to stand his regular watches for several days after the mishap occurred. That during said period the sight of libelant's left eye deteriorated and he was sent to a hospital ashore upon arrival at the next port of call. That at the time of the trial libelant had lost substantially all of the sight of his left eye.

#### IV.

That previous to the mishap on board the steamship *Iran Victory* libelant had been troubled with poor vision in his left eye for a variety of reasons.

## V.

That libelant did not prove that it was the custom or practice to provide a pump to remove oil from iron drums on the decks of such vessels.

## VI.

That libelant did not prove that it was the custom or practice to provide a rack for use in removing oil from iron drums on the decks of such vessels.

## VII.

That libelant did not prove it was negligence on the part of respondent to fail to provide a pump for use in removing or drawing off oil from an iron drum on the deck of said vessel.

## VIII.

That libelant did not prove that it was negligence on the part of respondent to fail to provide a rack for use in removing or drawing off oil from an iron drum on the deck of said vessel.

## IX.

That the steamship Iran Victory was not unseaworthy by reason of failure on the part of respondent to provide a pump for use in removing or drawing off oil from an iron drum on the deck of said vessel.

## X.

That the steamship Iran Victory was not unseaworthy by reason of failure on the part of respondent to provide a rack for use in removing or draw-

ing off oil from an iron drum on the deck of said vessel.

### XI.

That the failure of respondent to provide a pump for use in drawing off or removing oil from an iron drum on the deck of said vessel was not a proximate cause of the splashing of oil in libelant's said eye.

### XII.

That the failure of respondent to provide a rack for use in drawing off or removing oil from an iron drum on deck of said vessel was not a proximate cause of the splashing of oil in libelant's said eye.

### XIII.

That respondent was not negligent in directing libelant and two fellow seamen to take oil out of an iron drum on deck when neither a pump nor a rack for that purpose was available.

### XIV.

That libelant has not proved that respondent was negligent in any of the respects alleged in the libel.

### XV.

That libelant has not proved that respondent's vessel was unseaworthy in any of the respects alleged in the libel.

### XVI.

That the taking of oil by three men out of an iron drum on the deck of a vessel by tipping it over is a simple operation.



## XVII.

That any injury to libelant's left eye was either a simple accident or was due solely to libelant's own negligence in holding his face close to the bucket.

The Court does not find it necessary to make any findings as to whether the loss of sight in libelant's left eye was caused by the oil which got into it or was due to some other cause, and therefore makes no finding on that question.

## Conclusions of Law

## I.

That respondent, Pacific Far East Line, Inc., was not negligent by reason of failure to provide a pump for use in removing oil from an iron drum on the deck of the steamship Iran Victory.

## II.

That respondent, Pacific Far East Line, Inc., was not negligent by reason of failure to provide a rack for use in removing oil from an iron drum on the deck of said vessel.

## III.

That the steamship Iran Victory was not unseaworthy by reason of the failure of respondent to provide a pump for use in removing oil from an iron drum on the deck of said vessel.

## IV.

That the steamship Iran Victory was not unseaworthy by reason of the failure of respondent to provide a rack for use in removing oil from an iron drum on the deck of said vessel.

## V.

That the failure of respondent, Pacific Far East Line, Inc., to provide a pump for use in removing oil from an iron drum on the deck of the steamship Iran Victory was not a proximate cause of the libelant's getting oil in his eye.

## VI.

That the failure of respondent, Pacific Far East Line, Inc., to provide a rack for use in removing oil from an iron drum on the deck of the steamship Iran Victory was not a proximate cause of the libelant's getting oil in his eye.

## VII.

That libelant take nothing by reason of his first alleged cause of action of said libel.

## VIII.

That libelant take nothing by reason of his second alleged cause of action of said libel.

## IX.

That respondent is entitled to the entry of a decree in its favor and to costs of suit herein incurred.

Dated this 9th day of April, 1951.

Approved as to form:

.....,  
Proctors for Libelant.

/s/ EDWARD P. MURPHY,  
United States District Judge.

Lodged April 2, 1951.

[Endorsed]: Filed April 9, 1951.

In the Southern Division of the United States  
District Court for the Northern District of  
California in Admiralty

No. 25546-G

EDMUND E. SUNDWALL,

Libelant,

vs.

PACIFIC FAR EAST LINE, Inc., a Corporation,  
et al.,

Respondents.

### FINAL DECREE

The above-entitled cause having duly come on to be heard on the 14th of February, 1951, in the above-entitled court, Honorable Edward P. Murphy, United States District Judge, presiding, and the trial having been continued to and concluded on February 15, 1951; Belli, Ashe & Pinney and Van H. Pinney, Esq., appearing as proctors for libelant Edmund E. Sundwall, and Dorr, Cooper & Hays and Jay T. Cooper, Esq., appearing as proctors for respondent Pacific Far East Line, Inc.; and evidence both oral and documentary having been introduced and the cause argued and submitted for decision, and the Court after due deliberation having rendered its decision; and it appearing to the Court that there is no basis for establishing liability on the part of respondent Pacific Far East Line, Inc., and the Court having heretofore duly made and caused to be filed herein its findings of fact and conclu-

sions of law and having concluded that said respondent is entitled to entry of decree in its favor, and it appearing that said respondent has expressly waived costs taxable to date by said respondent,

Now Therefore, It Is Hereby Ordered, Adjudged and Decreed:

1. That libelant, Edmund E. Sundwall, take nothing under the libel filed herein from respondent, Pacific Far East Line, Inc.

2. That said libel be dismissed.

3. That said respondent, Pacific Far East Line, Inc., have judgment against libelant without costs.

Done in open court this 9th day of April, 1951.

/s/ EDWARD P. MURPHY,

Judge of the United States  
District Court.

Receipt of Copy acknowledged.

Lodged April 4, 1951.

Entered April 10, 1951.

[Endorsed]: Filed April 9, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL PURSUANT TITLE  
28 USCA, SECTION 2107

To the Clerk of the Above-Entitled Court:

To Dorr, Cooper & Hays, Esqs., Proctors for Respondent, and to Pacific Far East Steamship Company, Respondent.

You and Each of You Will Please Take Notice that the libelant in the above-entitled action, Edmund E. Sundwall, does hereby appeal to the Honorable Judges of the United States Court of Appeals for the Ninth Circuit from the Final Decree and Judgment of the Honorable Edward P. Murphy, entered herein upon the 10th day of April, 1951, and from all of it.

BELLI, ASHE & PINNEY,

By /s/ VAN H. PINNEY,  
Proctors for Libelant.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 6, 1951.



[Title of District Court and Cause.]

## PETITION FOR APPEAL

To the Honorable Edward P. Murphy, District Judge:

Comes now libelant Edmund E. Sundwall, in the above-entitled action and respectfully shows the court that:

### I.

Petitioner is the libelant in the above-entitled action.

### II.

Heretofore on April 10, 1951, this Honorable Court entered its Findings of Fact and Conclusions of Law in this case.

### III.

On April 10, 1951, judgment and final decree were entered in favor of respondent Pacific Far East Steamship Company and libelant's libel was ordered dismissed; until the aforesaid date, no final decree of dismissal was entered; this petition is made timely and within the statutory time allowed under 28 U.S.C.A. Section 2107, in Admiralty Cases.

### IV.

Libelant desires to appeal from the judgment and final decree of this Honorable Court to the United States Court of Appeals for the Ninth Circuit and is prepared to post bond in the sum of \$250.00 or such other reasonable bond as the Court may direct; that said appeal is not frivolously taken.

V.

Libelant will set forth Assignment of Errors pursuant to Rule 35, Rules in Admiralty, United States Court of Appeals for the Ninth Circuit.

Wherefore, petitioner prays order of this Court allowing appeal to the United States Court of Appeals for the Ninth Circuit upon such terms as the court may direct.

/s/ EDMUND E. SUNDWALL,  
Libelant.

BELLI, ASHE & PINNEY,  
Proctors for Libelant.

State of California,  
City and County of San Francisco—ss.

Edmund E. Sundwall, being first duly sworn, deposes and says:

That he has read the foregoing; that the same is true of his own knowledge except as to those matters stated therein on information and belief and to those matters he alleges he believes in their truth.

/s/ EDMUND E. SUNDWALL.

Subscribed and sworn to before me this 7th day of July, 1951.

[Seal] /s/ MARION M. BENDER,  
Notary Public in and for the City and County of  
San Francisco, State of California.

My Commission Expires December 25, 1954.

[Endorsed]: Filed July 6, 1951.

[Title of District Court and Cause.]

### ORDER ALLOWING APPEAL

The verified Petition for Appeal in the above-entitled matter having come before this court on the 6th day of July, 1951, and it appearing to the court that said petition has been made within the statutory time permitted for appeals in Admiralty under Title 28 U.S.C.A., Section 2107, and it further appearing that libelant has filed herein an Assignment of Errors pursuant to Rule 35, Rules in Admiralty, United States Court of Appeals for the Ninth Circuit, and the court being satisfied that said appeal is not frivolous,

It is Ordered, Adjudged and Decreed that libelant Edmund E. Sundwall be and he is hereby authorized to prosecute his appeal to the United States Court of Appeals for the Ninth Circuit upon posting with the Clerk of the District Court of the United States security bond in the sum of \$250.00.

/s/ EDWARD P. MURPHY,  
U. S. District Court Judge.

[Endorsed]: Filed July 6, 1951.

[Title of District Court and Cause.]

CITATION ON APPEAL

United States of America—ss.

The President of the United States of America  
To Pacific Far East Steamship Company, Respond-  
ent, and Dorr, Cooper & Hayes, Esqs., its  
Proctors, Greeting:

You Are Hereby Cited and Admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within 40 days from the date hereof pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, Southern Division, wherein Edmund E. Sundwall, appellant, and you are appellee, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

July 6, 1951.

/s/ EDWARD P. MURPHY,  
United States District Judge.

[Endorsed]: Filed July 6, 1951.

[Title of District Court and Cause.]

### COST BOND ON APPEAL

Whereas, the above-named Edmund E. Sundwall has appealed to the United States Court of Appeals for the Ninth Circuit from the Judgment entered against him in said action, in the United States District Court, in and for the Northern District of California, Southern Division.

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned, Maryland Casualty Company, a corporation duly organized and existing under the laws of the State of Maryland, and duly authorized to transact a general surety business in the State of California, does undertake and promise on the part of the appellant, to secure the payment of costs if the appeal is dismissed, or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, not exceeding the sum of Two Hundred Fifty (\$250.00) Dollars, to which amount it acknowledges itself bound.

It is expressly agreed by the Surety that in case of a breach of any condition hereof, the above-entitled Court, may upon notice to the Surety of not less than ten (10) days proceed summarily in the above-entitled action in which this bond is given, to ascertain the amount which the Surety is bound to pay on account of such breach and render judgment therefore against the Surety and award execu-



tion therefore, all as provided by and in accordance with the intent and meaning of rule 34 of the Rule of Practice of the United States District Court in and for the Northern District of California.

In Witness Whereof, the corporate seal and name of the said Surety Company is hereto affixed and attested at San Francisco, California, by its duly authorized officer, this 13th day of July, 1951.

MARYLAND CASUALTY  
COMPANY,

By /s/ ARTHUR J. CLEMENT, JR.,  
Attorney-in-Fact.

State of California,  
City and County of San Francisco—ss.

On this 13th day of July, 1951, before me, A. McClintock, a Notary Public in and for the City and County of San Francisco, personally appeared Arthur J. Clement, Jr., known to me to be the Attorney-in-Fact of the Maryland Casualty Company, the corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and he acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal at my Office in the City

and County of San Francisco the day and year in this Certificate first above written.

/s/ A. McCLINTOCK,  
Notary Public in and for the City and County of  
San Francisco, State of California.

My Commission Expires January 12th, 1953.

[Endorsed]: Filed July 13, 1951.

---

[Title of District Court and Cause.]

ORDER EXTENDING TIME WITHIN WHICH  
TO DOCKET APOSTLES ON APPEAL

Good Cause appearing therefor and it appearing that no prior requests for extension of time have been made or granted, it is hereby ordered that the time for docketing libelant's apostles on appeal in the within matter may be extended for a period of 30 days from the 15th day of August, 1951.

/s/ EDWARD P. MURPHY,  
Judge of the United States  
District Court.

[Endorsed]: Filed August 15, 1951.

In the District Court of the United States for the  
Northern District of California, Southern Division

No. 25546 (Admiralty)

EDMUND E. SUNDWALL,

Libellant,

vs.

PACIFIC FAR EAST STEAMSHIP CO., FIRST  
DOE and SECOND DOE,

Respondents.

REPORTER'S TRANSCRIPT  
ON APPEAL

Before Hon. Edward P. Murphy, Judge.

Appearances:

BELLI, ASHE & PINNEY, by  
VAN H. PINNEY, ESQ.,

Proctors for the Libellant.

DORR, COOPER & HAYES, by  
JAY T. COOPER, ESQ.,

Proctors for the Respondent.

Wednesday, February 14, 1951

The Clerk: Sundwall versus Pacific Far East  
Lines, for trial.

Mr. Pinney: That is ready.

Mr. Cooper: Ready, if the Court please.

Mr. Pinney: Does your Honor wish to look at

the pleadings or shall I make an opening statement?

The Court: I am familiar with the pleadings.

Mr. Pinney: If your Honor is familiar with the pleadings, I don't think it is necessary to make an opening statement, because I think the facts are adequately set forth in the pleadings before your Honor.

Mr. Cooper: I would like to make a brief statement, if agreeable to the Court.

The Court: Very well.

Mr. Cooper: If the Court please, I might say, as the pleadings show, this is an eye case which happened on board a ship, and we believe that the preponderance of the evidence will not show that the eye condition is due to anything that occurred on board the ship, and we anticipate that the preponderance of the evidence will not show that this vessel was unseaworthy.

As your Honor knows, there are two allegations, two causes of action in the complaint, one of negligence, and one [2\*] of unseaworthiness. For the purposes of this case, I submit that they are substantially the same.

I am going to state enough of the facts so your Honor will be able to follow the testimony which is not indicated in the pleadings; that is, as they were pouring a paint compound out of a fifty-gallon drum which had two holes in the top side of it—two plugs, I should say—one to let the air in so that the paint can go out, and the bottom one to

---

\* Page numbering appearing at top of page of original Reporter's Transcript of Record.

permit the contents to run out. These two seamen—two or three, I have forgotten which—according to the story of the libellant, were just simply pouring this out into this bucket, and it happened, according to the libellant's story, to slop up, and a few drops got in his eye.

It is our position, your Honor, that is a very simple operation; I mean it is a thing you would normally do on board a ship. It is as common as can be, and that method of getting paint out of a fifty-gallon drum into a bucket is nothing that is dangerous; it is something, as I say, that is commonly done, and it doesn't render the vessel unseaworthy because they didn't happen to have a pump. We do not believe that vessels generally have pumps to perform that operation. We think it is one of those cases which your Honor knows that it is a very common chore, that if the jury finds something is a pure accident there is no liability. We honestly think, your Honor, that this thing that caused the eye condition can be charged to just a pure [3] accident. It was a simple operation——

The Court: Let the facts be developed. I think you are arguing the case, Mr. Cooper.

Mr. Cooper. Perhaps I am, your Honor.

The Court: Proceed.

Mr. Pinney: Mr. Sundwall.



## EDMUND E. SUNDWALL

the Libellant, called as a witness in his own behalf, being first duly sworn, testified as follows:

The Clerk: Would you state your name to the Court for the record, please?

A. Edmund E. Sundwall.

## Direct Examination

By Mr. Pinney:

Q. Mr. Sundwall, where do you reside at the present time? Where do you live?

A. Well, the last year I have been in the Marine Hospital; otherwise I used to live at 25 Clay Street, the Albion Hotel.

Q. Can I ask you to talk just a little bit slower?

A. Oh, I see.

Q. What is your occupation? What do you do for a living? A. I am a seaman.

Q. How long have you been going to sea for a living?

A. Well, I started when I was a kid in 1911.

Q. In 1911? [4] A. Yes, sir.

Q. How old were you then?

A. I was close to eighteen.

Q. How old are you at the present time, Mr. Sundwall?

A. I am fifty-seven, the 5th of September.

Q. Have you ever done anything else for a living other than following the sea?

A. Very, very little. In 1912 I was shoveling coal; that is about all.

(Testimony of Edmund E. Sundwall.)

Q. Aside from that time in 1912 shoveling coal did you do anything other than following the sea for a living?

A. Maybe a week or fourteen days I was cutting ice up in Pennsylvania, it was slow shipping; otherwise I never worked ashore.

Q. In following the sea for a living what kind of ships have you sailed on? Have you sailed on both steam and sail?

A. Yes, sir, including light ships.

Mr. Cooper: What was that?

The Court: "——including light ships."

Q. (By Mr. Pinney): What have you sailed on principally, steam or sail?

A. Mostly steamers.

Q. You were injured in an accident on the 28th day of April, 1949? A. Yes, sir. [5]

Q. What ship—were you aboard ship at that time? A. Iran Victory.

Q. The Iran Victory. What rate did you have aboard that ship?

A. I was an able-bodied seaman.

Q. You were an a.b. Have you ever shipped as anything other than an a.b.?

A. Last year I sailed as boatswain.

Q. You sailed as boatswain? A. Yes, sir.

Q. How many voyages have you sailed as a boatswain?

A. I don't know exactly. I was a boatswain on the Iran Victory for seven months, and the ship before, the Ampac Los Angeles, I was there about

(Testimony of Edmund E. Sundwall.)

fifteen months, and before that I was—war-time I was on different ships eight or nine months in the South Pacific.

Q. When did you ship aboard the Iran Victory?

A. I beg your pardon?

Q. When did you sign articles aboard the Iran Victory? A. I believe the 8th of April.

Q. The 8th of April; that would be in 1949?

A. Yes, sir.

Q. When did the ship sail, do you know?

A. I think about two or three days after; we went down to Long Beach and loaded, and then back to San Francisco.

Q. When you shipped aboard the Iran Victory were you given any [6] kind of a physical examination by the ship's doctor?

A. I don't remember; I suppose we had—we mostly have, when we ship on these ships you always pass a physical examination on most of the ships.

Q. Most ships have physical examinations?

A. Yes, sir.

Q. Have you had occasions within the year preceding the date you shipped on the Iran Victory to take physical examinations?

A. Oh, yes, sir.

Q. Did you ever have any trouble with your eyes before you shipped on the Iran Victory?

A. No; I had a little accident years ago, in 1933, when I was a boatswain shipping on the West Iris,

(Testimony of Edmund E. Sundwall.)

but it don't amount to anything; I just got a little rust in it.

Q. You got some rust in your eyes?

A. Yes.

Q. That was in 1933? A. Yes.

Q. Did you *ever any* other injury to them?

A. No, not that I know of. Oh, yes, there was some time ago they claim I got a piece of wood in my head during the war, but the doctors believed that it caused the cataracts in my right eye.

Q. Is it correct to state that when you went aboard the Iran Victory you had some trouble in your right eye? [7]

A. Well, yes, just about two or three months before that, there was an Army doctor told me that I had something the matter with my eye and I should go up to the doctor about it. So the next day I went to the Marine Hospital, and I believe that was in the early part of January—maybe the latter part of December in 1948, or '49, and they told me to come back in six or seven months.

Q. Did you have any difficulty seeing out of your right eye when you shipped aboard the Iran Victory?

A. As a matter of fact I never noticed anything; it might be if they tried me out.

Q. You weren't conscious of any difficulty in seeing out of your right eye? A. No.

Q. How about your left eye when you boarded the Iran Victory, could you see out of that left eye?

A. So far as I know, they were perfect.



(Testimony of Edmund E. Sundwall.)

Q. Did you hurt your left eye aboard the Iran Victory?      A. Not exactly. I got oil in it.

Q. You got oil in it. When did that happen, what day, do you remember?

A. Yes, sir, the 28th of April, 1949.

Q. About what time of the day did it happen?

A. Well, we started to work at eight o'clock. I should imagine it was, oh, between 8:15 and 5:45, maybe. [8]

Q. What watch were you standing that morning?

A. I was standing eight to twelve watch, sir.

Q. When the boatswain broke out on the eight to twelve watch that day did he give you any specific instructions as to what you should do?

A. Yes, sir, he told me and another fellow to go and paint around the boat, to paint what they call the fidley.

Q. To paint the fidley?

A. Yes; he is going to send another man up there. There is a fifty-four-gallon drum lashed onto the port side against the railing; release that lashing and take five gallons out of that drum.

Q. Do you know the names of the other man or the other men whom the boatswain assigned to help you with this job?

A. Well, one man what I remember came up to see me in the hospital; his name was Bowles; he was a Dane, and then there was my watch partner, that other fellow, but I don't recollect his name.

Q. Somebody named Bowles and another man whose name you do not presently recollect were



(Testimony of Edmund E. Sundwall.)

assigned to work with you on this by the boatswain, is that right?      A. Yes, sir.

Q. He told you to get the oil into what?

A. A five-gallon bucket.

Q. Into a five-gallon bucket. What was the oil kept in that [9] you were to get into this five-gallon bucket?      A. I beg your pardon?

Q. What was the oil in before you emptied it into the five-gallon bucket?

Mr. Cooper: I think he said paint, counsel; it doesn't make any difference.

Q. (By Mr. Pinney): All right; will you kindly describe what you emptied into the five-gallon bucket?      A. Emptied the oil from the barrel.

Q. Oil from a barrel?      A. Yes, sir.

Q. Will you tell me about the barrel from which you emptied the oil? How big a barrel was it, do you know?

A. It was about four feet, I suppose, fifty-four gallons.

Q. Fifty-four-gallon drum, was it?

A. Yes.

Q. And where was that fifty-four-gallon barrel kept aboard the ship?

A. It was lashed with other two of the same kind on the port side up on the top of the poop deck.

Q. It was lashed with two others on the port side of the poop deck?

A. Yes, up against the rail.

Q. And when you went up there to empty it, did you immediately empty the oil from the barrel

(Testimony of Edmund E. Sundwall.)

into the bucket, or did you do [10] something else?

A. No; we got the order to release the lashing, so I looked—like that we should have a pump; we don't need to take the lashing off the barrel, the barrel can be lashed all the time, just use the pump. They don't had no pump, so we took the lashing off and I held onto the bucket.

Q. Did you ask anybody for a pump?

A. Yes, sir.

Q. Who did you ask for a pump?

A. I asked the boatswain for a pump and he made the statement they don't have no pump on the ship.

Q. You have been going to sea ever since 1911, have you?      A. Yes, sir.

Q. Do you know what the custom is relating to removing oil from a fifty-four-gallon barrel on board ship?

A. The way I always done it and always seed it done, either to have a pump or else with a barrel high enough where you can get a bucket underneath and have a spigot.

Q. I believe you said you asked somebody for a pump?      A. Yes, sir.

Q. And you were told that there wasn't any pump, is that correct?      A. That is correct, sir.

Q. After the boatswain told you that there wasn't any pump did he tell you how to go about getting the oil out of the barrel? [11]

A. That was the only way, I suppose, to take

(Testimony of Edmund E. Sundwall.)

the top and the air top out there and the cap off and release the lashing and then pour out that way.

Q. Was there any spigot provided for you to use in getting the oil out of the barrel?

A. No, sir, they just told us to go ahead the way it was, release the lashing on the barrel and pour it in a bucket that way.

Q. Somebody told you to do it that way?

A. The boatswain told us to take the lashing off and get the five gallons of paint or oil out of there.

Q. Have you ever worked upon any ship where they didn't provide you with either a pump or a spigot?

A. No, sir.

Q. To take oil out of a barrel?

A. No, sir.

Q. Never in the years you have been to sea?

A. No, sir.

Q. How did you get the oil out of the barrel on this occasion?

A. Well, we took the cap off; the two fellows knocked the cap off or turned it so it could turn around, and pulled the barrel over, and I held the bucket.

Q. Who pulled the barrel over?

A. Them other two men, Bowles and——

Q. What did you do? [12]

A. I held the bucket, sir.

Q. With you holding the bucket and the other two men pulling on the barrel will you tell us what happened?

A. Well, when we had about three—maybe three and a half feet of oil in that bucket, then all of a

(Testimony of Edmund E. Sundwall.)

sudden, if they released the air hole or if the ship rolled, I can't tell you anything, that that oil splashed up and came in my face.

Q. You don't know what happened that made the oil come in your face, is that correct?

A. No, because I were watching the bucket so I don't get anything on the deck.

Q. How much oil came up in your face, do you know? A. Oh, quite a lot.

Q. Did it cover your face?

A. Well, pretty well, good on one side, the way I was standing, the left side against the barrel.

Q. Did any of the oil get in your eye?

A. Positively.

Q. What eye? A. My left eye.

Q. What did you do then?

A. Well, after we got the oil in the bucket, I took the oil to the boat deck and I took and I put it down, and my eye started getting sore, burning. I went down to the washroom and put some water in my eyes and on my face later, and I went back and I [13] started to faint. I never thought that during the time that anything should happen; I thought that it was——

Q. You washed your eye and went back to work; is that what you did? A. Yes.

Q. And did you go to the purser or anybody else for any medical assistance?

A. I finished the work, me and Bowles, then I went to the purser.

Q. When did you go see the purser?



(Testimony of Edmund E. Sundwall.)

A. Yes, sir.

Q. When?

A. Well, it was just—that work only took, I imagine, about an hour or so to paint around the fidley, and I went to the purser then because my eye started to burn, and he gave me an eyeglass to wash my eye out, and the first time I washed my eye out—there was a wash basin there, so I applied to whatever it was—whatever it was I don't know. And he says, "You shouldn't do that. I should like to see that." So he took the glass and he says, "There is a lot of oil in that eye cup." I said, "That's all right."

Q. He said, "There is oil in the eye cup" anyhow, on what date?

A. Yes, that was the first day.

Q. That was on the day of the accident?

A. Yes, sir. [14]

Q. And that was about an hour after the accident, you said?

A. I imagine something like that.

Q. By the way, let me ask you one more question about this barrel. Do you know whether or not the barrel was full before you started pouring the oil?

A. Yes, sir, the barrel was full because there was seal on it. We had to break the seal before we can release the top.

Q. Did you ever see the purser again about your eye after that first occasion that you told us about?

A. Yes, mostly—mostly every day, once every



(Testimony of Edmund E. Sundwall.)

day, but mostly before I went to the wheel or when I came from the wheel. So he gave me some salve and some drops, and he told me the drops was a little too strong for my eyes.

Q. Did you continue to put the salve on your eyes that he gave you?

A. Yes, he gave me a tube.

Q. Did you put the drops in your eye?

A. He put the drops a few times and he told me that the eye drops he had was too strong for my eye.

Q. Did your eye continue to bother you while you were working aboard the ship?

A. Yes, sir, it got worser.

Q. It got worse? A. Yes.

Q. Where was the ship bound? [15]

A. She was bound for Okinawa.

Q. Did you continue to work aboard the ship until you reached Okinawa?

A. Yes, but the last day I can't take the wheel because I can't see the compass.

Q. The last day you couldn't see the compass? Is that right?

A. Yes, sir, so somebody took the wheel and I were working on deck.

Q. When did you first become aware of the fact that you were having trouble seeing out of your left eye?

A. Well, as a matter of fact, it seems like it started about two or three days after, it started to get foggy, hazy.

(Testimony of Edmund E. Sundwall.)

Q. By two or three days, you mean two or three days after you splashed this oil in your eye?

A. They were very inflamed and sore during this time, but I don't know——

Q. It started to fog and then did it gradually get more foggy every day?

A. I beg your pardon?

Q. Did it gradually get more foggy every day?

A. Yes.

Q. Until finally you reached the point where you couldn't see the compass?

A. Yes; and the day they took me to the doctor it was very bad, I couldn't hardly see [16] anything.

Q. Now I think you testified—let me ask you again—when you got this oil in your eye, did it burn at all?      A. Yes, sir.

Q. How long did this paining sensation of your eye continue?

A. Well, I had a sore eye there for a long, long, long time.

Q. Did it continue to burn up until the time you saw the doctor or did the burning leave?

A. No.

Mr. Cooper: I am going to object to that as leading.

The Court: Sustained upon that ground.

A. It was still sore during the time I was in the hospital in Okinawa.

Q. (By Mr. Pinney): You said something about a hospital in Okinawa?      A. Yes, sir.

(Testimony of Edmund E. Sundwall.)

Q. Did you go to a hospital in Okinawa?

A. They took me to the dispensary—they drove me to the dispensary, and the Army doctor looked at my eye and he said, “You should be in the hospital,” and they took me to the hospital in an ambulance.

Q. Do you know what day you were taken to the dispensary and to the hospital at Okinawa?

A. It seems to me the 10th or 11th. We arrived the 10th, I believe, and it was the 11th early in the morning, about half past eight in the morning. [17]

Q. That would be the 10th or 11th of May, would it, in 1949?      A. Yes.

Q. Did they do anything for you at the dispensary? Did they give you any treatment for your eye or not?

A. No, sir. He said, “We will take you right away to the hospital.”

Q. Do you know what hospital you went to in Okinawa?

A. It was an Army hospital; that is all I can say, sir.

Q. What treatment did they give you at the Army hospital in Okinawa?

A. They washed my eye out and gave me some drops and some salve and bandaged me up, and they put me to bed.

Q. Did they give you drops more than once?

A. Every morning somebody took me—they have an Army dispensary across the street from the hos-

(Testimony of Edmund E. Sundwall.)

pital barracks there, so they always provided me a cab to take me over there every morning so they treated my eyes and they brought me back to the hospital.

Q. How long did you remain in the hospital in Okinawa?      A. To the 14th of June.

Q. What happened on the 14th of June?

A. About the 10th of June a doctor came from Manila, and he told the other doctor, "The only thing I can do with that fellow is to send him back to the States as fast as possible, because his eye is pretty bad." So the 14th of June they fly me to Guam. [18]

Q. Did you go into a hospital in Guam?

A. Yes, sir.

Q. How long did you remain in the hospital in Guam?      A. Two days.

Q. Where did you go from Guam?

A. Took an airplane from Guam to Honolulu.

Q. Do you know when you got to Honolulu?

A. Well, it was the next day, next evening or night, about seven or eight or nine o'clock at night the next day.

Q. That would be about the 16th or 17th of June; something like that?

A. Yes. No, it must be before that, because we left there about two o'clock in the evening, and we got back to Honolulu about eight—seven or eight o'clock at night.

Q. To what hospital did you go in Honolulu?



(Testimony of Edmund E. Sundwall.)

A. I think they call it the Trickler Hospital; something similar, a new Army hospital.

Q. An Army hospital in Honolulu?

A. Yes.

Q. How long did you remain there?

A. I were there ten days.

Q. Where did you go from there?

A. From there they fly me back to Fairfield, and the ambulance took me to the Marine Hospital.

Q. In the various hospitals you were in from the time you left [19] Okinawa did they do anything for you other than change the dressings and put drops in your eyes?

A. No, that's all they did, just the dressings.

Q. When you reached the Marine Hospital, that was approximately when?

A. That was the 24th of June.

Q. 24th of June, 1949?            A. Yes, sir.

Q. What treatment did they give you when you reached the Marine Hospital in San Francisco?

A. I arrived about five o'clock in the evening. They took me right into that eye doctor and he washed it out and treated and cleaned it out, because he asked me how long it had been since that had been washed out. I told him three days, but they put clean bandages on, but he started to treat me right away that night. His name is Doctor Faith.

Q. Were any operations performed on your eyes in the Marine Hospital in San Francisco?

A. During the time I were laying in the hospital



(Testimony of Edmund E. Sundwall.)

in San Francisco here they told me that my cataract was pretty bad and they could remove it. So they removed it the 24th of July.

Q. The 24th of July they removed a cataract; that was in which eye, Mr. Sundwall?

A. The right, sir.

Q. That was the right eye? [20]

A. Yes, sir.

Q. That wasn't the one that was hurt in this accident?

A. I beg your pardon?

Q. That wasn't the eye you got the oil in?

A. No, sir.

Q. What did they do for your left eye?

A. Well, they treated it for a long time, and I was in the hospital from the 24th of June to about the 24th of October. They told me if I want to stay in the hospital to transplant the cornea I can stay, but if I am not willing, to get out of the hospital. I can see a little, so I went outside.

Q. You left the hospital the 24th of October?

A. Yes, sir.

Q. Of 1949?

A. Yes, sir.

Q. And did you go back to the Marine Hospital later on?

A. Yes, sir, I was up every tenth or fourteenth day; sometimes they telephone me to come up there.

Q. You didn't go to sea during this time?

A. Oh, no.

Q. Did you go back in the hospital as a patient?

A. I got a telephone call the 7th of February to come up to the hospital right away because the

(Testimony of Edmund E. Sundwall.)

8th of February, next day, they going to transplant the cornea.

Q. That would be the 8th of February, 1950, is that right? [21]           A. Yes.

Q. On that day did they perform an operation on your eye?           A. Yes.

Q. And that was on which eye?

A. My left eye, sir.

Q. On the left eye. Did you continue to remain in the hospital after that operation?

A. I have been there since.

The Court: You have been there ever since?

A. Yes, sir.

Q. (By Mr. Pinney): You are still a patient at that hospital?           A. Yes.

Q. After the 8th of February when they performed the operation on your left eye, could you see better out of the left eye then after the operation?

A. Yes, I could see—it seems to me I could see then about, say about three weeks, I came—after I was in that bed about nineteen days, then I could sit around in the hospital, so they used to send me over to the University of California Hospital for some kind of radium treatment, so I was able to take the automobile that they gave me and get along pretty good over there and then come back again to the hospital. I went five or six trips all told.

Q. After this operation on February 8th, did they perform any other operations on your left [22] eye?

(Testimony of Edmund E. Sundwall.)

A. Yes, and then about—just after that it started to cloud up very, very bad.

Q. It started to cloud up after this operation, you mean?

A. Yes, so Doctor Hogan would come over, and he told me, “In another week we will send you over to the University of California; we going to check on your eye to see if we can transplant another cornea—” which they did September 15th.

Q. On the 15th of September they performed a second operation on the left eye? A. Yes, sir.

Q. Following that second operation, after a while could you see better out of your left eye?

A. Yes, for a little short while, because—I don’t understand it, but the doctor told me—he never mentioned it, but he said there is something the matter with it, so we have to operate another three weeks.

Q. All right.

A. So on the 6th of October they—I found out afterwards iris was stopped; they released the iris October 6th.

Q. The 6th of October they performed some kind of an operation on the iris? A. Yes, sir.

Mr. Cooper: Is that for the same eye?

Q. (By Mr. Pinney): All these were on the same eye, the 8th of October, the 15th of September and the 6th of October were all [23] to the left eye, were they?

The Court: Do you understand the question?

Q. (By Mr. Pinney): Were all of these three

(Testimony of Edmund E. Sundwall.)

operations—Mr. Sundwall, the operation on the 18th of February was on what eye?

A. On my left eye.

Q. The 15th of September that operation was to what eye?      A. My left eye.

Q. The 6th of October was to which eye?

A. On my left eye, sir.

Q. On the left?      A. Yes, sir.

Q. Can you see out of the left eye at the present time?

A. I just can make out lights, that's all, but I can't make out faces or anything. I depend on my right eye at the present time.

Q. Can you see me now from where you are sitting on the witness stand?

A. I can see there is something just moving; I can't see no faces.

Q. You can't recognize me?      A. No, sir.

Mr. Pinney: I have no further questions.

### Cross-Examination

By Mr. Cooper:

Q. Mr. Sundwall, you are a single man, are [24] you?      A. Yes, sir.

Q. You told us that you were an a.b. on the Steamship Iran Victory.      A. Yes, sir.

Q. You also told us that you had served on some other vessels.      A. Yes, sir.

Q. Or at least on other occasions as a boatswain?

A. Yes, sir.



(Testimony of Edmund E. Sundwall.)

Q. How did it happen that you were an a.b. on the Iran Victory?

Mr. Pinney: Your Honor, I will object to that as incompetent, irrelevant, and immaterial.

The Court: What is the purpose of that?

Mr. Cooper: I think it has a bearing. I believe his right eye, as a matter of fact, was affected when he signed on the Iran Victory at that time.

A. Well, the reason I shipped on board the Iran Victory——

The Court: Wait a moment. Do you mean to say that you are going to develop the fact that he shipped as an able bodied seaman——

Mr. Cooper: Yes, your Honor.

The Court: ——and took a reduction in rank because of failure of vision in his right eye?

Mr. Cooper: I think he might well have decided to work as an a.b. rather than——

The Court: He admits he had difficulty in his right eye [25] before he signed on?

Mr. Cooper: I didn't understand that.

The Court: Is that correct, Mr. Pinney?

Mr. Pinney: That is correct.

The Court: There doesn't seem to be any question about that.

Mr. Cooper: I didn't catch the testimony then. I had difficulty understanding him.

Q. Then you had difficulty with your right eye when you signed on the Iran Victory, is that right?

A. Yes, I guess I had a little.

Q. As a matter of fact, your vision in your right



(Testimony of Edmund E. Sundwall.)

eye had practically disappeared, had it not, at that time?

A. Well, I don't know; after the operation Doctor Schafer told me that they had to remove two lenses of that eye and eye wouldn't be very good, but I will see something out of it if I used strong glasses.

Mr. Cooper: Will you read that, Mr. Reporter.

(The reporter read the answer.)

Q. (By Mr. Cooper): What operation are you talking about—before you signed on the Iran Victory or afterwards?

A. Oh, no, it was after. I don't had no operation before I signed on the Iran Victory; all that operation happened after I got hurt on the Iran Victory.

Q. The operation you are talking about is after you were [26] injured on board the Iran Victory?

A. Yes, sir.

Q. Had you had your eye examined before you went on the Iran Victory by the Marine Hospital doctors?

A. I imagine we had. They always examine us before we ship and sign the articles anyhow; that is very common; I never did pay attention particularly.

Q. Mr. Sundwall, the fact is they don't give you an eye examination.

A. Sometimes they do, yes.

Q. They don't unless there is something special called to their attention about your eye, do they?

A. Where men ship out of different ports, if they ship in Baltimore or New York, they have different customs. They call it—

(Testimony of Edmund E. Sundwall.)

Q. How long have you been shipping out of San Francisco?

A. I arrived in San Francisco in 1922. Mostly all the time I have been except in 1946 I were running for the Marshall Plan ships, we ran out of Canada.

Q. In other words, you have been shipping out of Pacific Coast ports for a great many years?

A. Yes, sir.

Q. As a matter of fact they give you what is commonly called a very routine examination, they don't customarily examine your eyes, do they, when you ship on on board ship? [27]

A. It depends on the companies.

Q. I think you have told us that you don't recall what examination was made before you signed on the Iran Victory; is that correct?

A. Well, I can't remember that; I passed so many examinations I can't exactly say yes or no to that. They might pass an eye examination.

Q. You are telling us then that you might have passed an eye examination; is that what you told us?

A. Well, if they examined eyes I don't remember that, because you have to pass some physical examination, see, and so forth, before you sign on your ship.

Q. How long does it take in your experience to pass a physical examination for each man?

A. Oh, sometimes it takes ten minutes, fifteen minutes.

(Testimony of Edmund E. Sundwall.)

Q. How many were there on the ship, the Iran Victory?

A. Iran Victory, I imagine about forty-two; maybe forty-five.

Q. Mr. Sundwall, what was the ship that you were on preceding the Iran Victory, can you tell us?

A. No, sir.

Q. Didn't you tell us when I took your deposition about a year ago in our office that you had been on the Ampac Los Angeles, which is operated by the American Pacific Company, Steamship Company?

A. Yes, that's right, sir. [28]

Q. It is a fact, isn't it, you left that vessel on the 16th day of——

A. September, I think.

Q. September of 1948?

A. Yes.

Q. And then you didn't sign on the Iran Victory until the 8th day of April of 1949?

A. That's right.

Q. What did you do in the meantime?

A. During the meantime was the strike in San Francisco, and I can't ship, they had the pickets around the docks, there was nobody could ship out, and just after the strike was settled there were so many men ashore it takes a long time, and the shipping cards ran out. When my card got pretty close, they always ran out.

Q. Where were you located during that time, during the ship strike?

A. I was living at 25 Clay Street.

Q. You were living at 45 Clay Street?

A. 25 Clay Street.

Q. So you didn't—I think I asked you the ques-

(Testimony of Edmund E. Sundwall.)

tion a while ago about where you were examined. You say you were examined on the ship. Did you go to any marine hospital during that period?

A. Yes, as I told, when there was a fellow told me there was [29] something wrong with my right eye, the very next day I went up to the Marine Hospital.

Q. Somebody told you there was something wrong with your right eye. Who told you that?

A. I was sitting in a restaurant or a saloon having a glass of beer or a cup of coffee, whatever it was. He was an Army captain and he introduced himself, I can't remember his name. He told me, "If I was you I should see about my right eye" because there is something in my eye. So the very next day I took his advice and I went up to the Marine Hospital and saw Doctor Schafer and Doctor Rigsby, and he told me he can't do anything on them now, I have to wait another half year, so during that time I shipped.

Q. Didn't you yourself recognize any trouble with your right eye? A. No, I never did.

Q. I take it there was some spot on it, was there, at that time? A. Yes, that is what he claimed.

Q. Am I correct in saying that at one time that you weren't conscious of any trouble with your right eye when you were on the Iran Victory?

A. No.

Q. You were conscious of trouble with your right eye, is that right? [30]

A. Yes, according to that doctor, but it didn't bother me or anything else.



(Testimony of Edmund E. Sundwall.)

Q. You mean it didn't hurt you?

A. No, sir.

Q. It didn't pain you? A. No, sir.

Q. You couldn't see through your right eye, could you?

A. Well, I guess when I started to realize——

Q. Go ahead, Mr. Sundwall. The reporter is just trying to get what you said.

A. Well, after I went to the doctor, I guess I started to realize that that eye was bad, but before that——

Q. You mean the United States Marine Hospital doctor? A. Yes, sir. Before that——

Q. You nevertheless signed on board the Iran Victory with that eye? A. I beg your pardon?

Q. You still signed on board the Iran Victory?

A. Yes, because they told they can't do anything with that eye for about another half year or so.

Q. Did they tell you you had a cataract on it?

A. I suppose that is what it was, I suppose, at the start; I don't know.

Q. In regard to the left eye, Mr. Sundwall, you told us that you got a piece of rust in it. What year was that? [31]

A. That was 1933. I were boatswain on the McCormick Ship West Iris.

Q. As a matter of fact, you had inflammation of that eye after that from time to time, did you not?

A. No.

Q. Didn't you tell the United States Marine Hospital that—— A. No, I didn't know.



(Testimony of Edmund E. Sundwall.)

Q. Didn't you tell the United States Marine Hospital that you had had inflammation in that eye from time to time?

The Court: By "that eye" do you mean the left eye?

Mr. Cooper: The left eye.

A. It may be inflamed once in a while like a lot of other things; otherwise I don't know that it ever bothered me anything like that, sir, that eye.

Mr. Cooper: If the Court please, the hospital records are here. I assume they were subpoenaed for production.

The Clerk: They were up here at the beginning of recess.

Mr. Pinney: We haven't received them.

Mr. Cooper: Mr. Pinney and I saw Doctor Head yesterday and he said they would be here this morning. Pending their arrival here, I have a copy of the clinical record signed Doctor Harold T. Castburg, who was the senior surgeon and deputy medical officer in charge. Pending their arrival may I refer to it?

Mr. Pinney: I assume this is a true copy of that record. No objection to the use of it. [32]

The Court: Very well. You may use the copy.

Mr. Cooper: May I have it marked for identification Respondent's Exhibit A.

(The abstract of clinical record referred to was marked Respondent's Exhibit A for identification.)

(Testimony of Edmund E. Sundwall.)

Q. (By Mr. Cooper): Mr. Sundwall——

A. Yes, sir.

Q. One of the first things that they do, and did in this case, when you went to the hospital, is to ask you to tell them about the history of the eye, is that right?

A. When I came to the Marine Hospital?

Q. Yes. A. Yes, I suppose they did.

Q. And you told them, you gave them a history at that time, did you not?

A. Yes, sure, I gave them the history.

Q. Did you not tell them at that time that some rust lodged in your left eye, followed by occasional episodes of inflammation since that time?

A. No; I told them. I says it may be red once in a while but I never have no—I have no trouble with that eye, and that happened in 1933.

Q. Mr. Sundwall—— A. Yes, sir.

Q. Were you conscious of any difficulty with seeing through your [33] left eye while you were on the Iran Victory? A. No.

Q. And before this mishap occurred with the oil, as you called it? A. No, sir.

Q. You were not? A. No, sir.

Q. You were acting as a.b. Now, Mr. Sundwall, a boatswain tells you the job to do, and you being an a.b., you go ahead and do it, is that right?

A. That is right.

Q. He doesn't come there and show you how to do it? A. He tells you how to do it, yes.

Q. You mean to say he tells you exactly how to

(Testimony of Edmund E. Sundwall.)

tip the barrel over or the drum over and get some paint or oil in the bucket?           A. Yes, sir.

Q. You mean he gave you detailed instructions how to do it?

A. Sure, he told us to raise the barrel, we don't have no pump there, which is the only way you can get oil out of the barrel.

Q. What is that again?

A. That is the only way you can get oil out of a barrel if you don't have no spigot or pump.

Q. He didn't have to tell you how to do it, did he?           A. Oh, sure. [34]

Q. You mean to say he told you to go up and tip that barrel and let it run out?

A. He was there when we took the lashing off the barrel.

Q. He wasn't present when it happened?

A. No, he wasn't but he was there when we took the lashing off.

Q. You said you got the bucket?           A. Yes.

Q. Where did you get the bucket?

A. I got it in the paint locker, I imagine. I don't know if the boatswain handed me the bucket or I got it from the paint locker. I don't pay attention to things like that.

Q. So you have told us now that you remember the other men tipped the drum over?

A. Yes, sir.

Q. And you had gotten the bucket?

A. That is right.

Q. And you told us there was about three and

(Testimony of Edmund E. Sundwall.)

half feet of oil, as you called it,— A. Yes.

Q. When this thing splashed up in your face?

A. That is right.

Q. Was the bucket sitting down on the deck at that time?

A. No, I was holding the bucket and grabbing it so it don't come on the— [35]

Q. You were holding on the bucket?

A. Yes.

Q. You were holding on the bucket by the bail? Do you know what a bail is?

A. Yes, it is the same as like a bucket.

Mr. Pinney: If your Honor please, may I interrupt just a second. The young lady is here from the Marine Hospital with the hospital record, and I have in Court Doctor Bricea who has made an examination of Mr. Sundwall and will testify. I would like to have him have the opportunity to look at these records briefly before testifying so that he can have a more complete picture. At this time may we introduce the records so the Doctor may look at them?

The Court: Any objection?

Mr. Cooper: I have no objection.

The Court: All right; step down. You'd better help him down.

Mr. Pinney: Miss Boe, of the Marine Hospital, will you take the stand? [36]

EDMUND E. SUNDWALL

recalled, and having been previously sworn, testified as follows:

Cross-Examination

(Resumed)

Mr. Cooper: In the interest of time, I consent to the Doctor looking at the records, if the Court please.

By Mr. Cooper:

Q. Mr. Sundwall—— [38] A. Yes, sir.

Q. This bucket that you have told us about, the five gallon bucket which you got to get the paint or oil in, how deep is that bucket from the top of the bucket itself down to the bottom of it?

A. How deep? I imagine it is about—let's see—four feet, five feet—four feet, I guess. No, I don't know; about two and a half feet. A common bucket. I never measured it; I don't know.

Q. You think now about two and one-half feet?

A. No. Well, a common bucket; I don't know.

Q. It isn't a common market bucket; it is a bucket that commonly has paint in it?

A. It wasn't a common paint bucket; but they have five gallon cans; it was just a common bucket. It wasn't a paint bucket. It was just an old bucket what they been using in painting; it was no good for that purpose anymore. That was the kind of bucket it was.

Q. It was a bucket you had been using to mix paint in; is that what you said?



(Testimony of Edmund E. Sundwall.)

A. No. I don't know what they had been using it for; just a common bucket, just like somebody have scrubbing the floor and things like that. That is what kind it was.

Q. It held five gallon?

A. About five gallons. [39]

Q. You said about two and a half feet?

The Court: He said three and a half feet, full of oil or paint.

Q. That had a bail or handle on it, I believe you call it? A. Yes.

Q. That had a bail on it? A. Yes.

Q. Did you have hold of the handle or the bail?

A. I had hold of the handle and——

Q. You were standing there——

Mr. Pinney: Let him finish his answer.

Mr. Cooper: All right. What were you going to say?

A. I were holding the handle to the bail because I had to move the bucket so I don't get any paint on the deck.

Q. You said you had hold of the handle.

A. To the bail.

Q. To the what? A. To the bucket.

Q. To the bucket?

A. I had a handle and then a hand underneath to move it when the oil came out of the barrel so it don't come on the deck.

Q. Weren't you just standing there holding on the bail of that bucket, you know the thing that comes up over the top—weren't you just standing there holding onto it?

(Testimony of Edmund E. Sundwall.)

A. No, I had to move the bucket, because the ship was moving a [40] little, and things like that.

Q. You were telling us that you had hold of the bail with one hand and had the other hand under the bottom of the bucket.

A. Yes, holding the handle to the bucket with one hand and I held the bail with the other—the bail or the bucket—we called it bucket.

Q. You call it——

A. I don't know what you call bail.

Q. You said the bail or bucket; is that what you just now said?

A. I don't know; but I thought it was—they call it a bucket on the ship.

Q. That is what I call it. I don't know whether you were saying bail or pail.

A. We call it——

Q. The bail is the handle on the bucket.

A. This is a bucket——

The Court: Let's not quibble about these trifles. We all know he was holding some kind of bucket.

Mr. Cooper: I couldn't tell just what he meant by his testimony, your Honor. That is the reason I was trying to find out.

Q. You were holding it with one hand on the bail or handle and the other hand under the bucket, is that right?

A. Yes, sir. [41]

Q. Where was your face in reference to the top of that bucket?

A. I was standing like that with my left side to the bucket like, when all of a sudden there—they

(Testimony of Edmund E. Sundwall.)

were running gently, and then all of a sudden oil came all out at one burst. If they had released the air hole or if the rolling of the ship make it come all in big bursts, then it slopped in my face.

Q. It slopped out of the bucket, is that right?

A. Yes, it did.

Q. Didn't you tell the purser when you reported this injury to him that only a few drops got in your eye?

A. It might be only a few drops in the eye, but I had quite a lot on me.

Q. You tell us you took the bucket and put it some place on the boat deck?

A. That's right.

Q. Did you wait until the bucket got full before you took it there or was the bucket practically full?

A. The bucket was full; it was overrunning.

Q. It was what?

A. The bucket was full already when I left the poop deck.

Q. So you took it up to the poop deck and then you went down and washed your eye?

A. No, I took it up to the boat deck.

Q. And then you went down into the sailors' quarters and washed your eye? [42]

A. Yes.

Q. And then you came back on the top again?

A. Yes, sir.

Q. And finished your watch, is that right?

A. I finished that work, then I went to see the purser.

Q. Mr. Sundwall, I took your deposition, did I

(Testimony of Edmund E. Sundwall.)

not, on the 28th day of January in my office—the 28th day of January, 1950, in my office?

Mr. Pinney: We will stipulate that you took his deposition on that date, counsel.

Mr. Cooper: Very well. Counsel, I will refer you to the bottom of page three of that deposition, line twenty-five.

Mr. Pinney: Stipulate that that question was asked and the answer that follows it was given.

Mr. Cooper: I will read the question and answer:

“Q. You didn’t report that injury until the next day, did you?

“A. No. My eye looked all right. I never thought anything of it when I got that trouble in my eye. It started to run a little. I went to the washroom and put some water in my eye, and I believe before that I went to the wheel. I had that, well, burning sensation in my eye, but I didn’t pay much attention to it, and I believe I went and reported to the purser; maybe it wasn’t before the next day, but I believe it was the next day.” [43]

Counsel, may I continue to read?

Mr. Pinney: Yes, continue to read.

Mr. Cooper: (Reading.)

“Q. You think it may have been the next day. Could you be mistaken on that?

“A. Yes.



(Testimony of Edmund E. Sundwall.)

“Q. You know you didn’t go immediately? You know that?”

“A. Yes, I know that because I washed my eye and never thought anything of it that day.”

Is that correct, Mr. Sundwall?

A. No, I think that is incorrect, because the reason why I said that word is that when the purser gave me that eyeglass to wash my eye out there happened to be a wash basin close by, where I had to wash my eye for half a minute or maybe a minute, whatever it was.

Q. You think that was wrong—your testimony is you think that was wrong, is that it?

A. Well, after I emptied that eye wash, the purser told me, he said, “You shouldn’t keep that.” Then he took the glass and he looked, and he says, “\* \* \* a lot of oil in that glass,” and it couldn’t be the next day. I don’t see how I could have that oil next day.

Q. You think because he told you that, according to your testimony, that there was oil in the glass, that it must be right away? [44]

A. I am pretty near certain that it was right away after I finished the painting.

Q. Mr. Sundwall, you gave a story of how it happened, did you, to the purser?

A. Yes, sir.

Q. At that time?                      A. Yes.

Q. And he wrote down, did he not, in your



(Testimony of Edmund E. Sundwall.)

presence what you had told him? Do you remember that?

A. Well, I suppose I do. The only thing is I tell the way it happen, and I still thought it was the same day; he may be mistaken a day himself, because I am pretty near positive I went up to the purser right away after I finished the work.

Q. As a matter of fact, you didn't go to the purser, did you, Mr. Sundwall, until six days later, that is, which would have been the sixth day of May, 1949?

A. Well, he gave me some eye drops and he told me it was too strong for my eye, and he gave me some salve.

Mr. Pinney: You don't understand the question.

Mr. Cooper: Maybe that is his way of answering, counsel.

The Witness: And he gave me some salve, and he says, "You can treat that eye there," but I believe I went there most every day to the purser, but I still had the salve put in my eye during the time.

Q. (By Mr. Cooper): You used salve? [45]

A. Salve, yes.

Q. Isn't it a fact, Mr. Sundwall, that really there wasn't anything noticeably wrong with your eye until two days later after this and you noticed some mucous in your eye when you got up in the morning?

A. There was pain all the time then, but I never thought anything of it the first couple of days or so, like anything else; I never thought I should be

(Testimony of Edmund E. Sundwall.)

in the hospital over a year and a half over things like that.

Q. As a matter of fact, you continued to do your work, stood your watches, did you?

A. Yes. But as I said before, I believe the purser mistaken, because before I went to the wheel I must have went to the purser, and when I came from the wheel, so I think he greatly mistaken on it.

Q. You think now that you went to the purser when you came from the wheel that day?

A. Yes, because mostly because my eye was tired from looking on the compass.

Q. When you are standing at the wheel it requires that you see the face of the compass, does it not?

A. Yes.

Q. How big is that compass?

A. In diameter about——

Q. About that big (indicating)? [46]

A. I can't say that, no, sir; from there about that size.

Q. It has the points of the compass indicated on it?

A. No, sir, not anymore; they have bare compass; it has just a number.

Q. While you are steering at the wheel you have got to watch to see that you are keeping the vessel on the course, do you not?

A. Yes, sir.

Q. How many times did you stand a wheel watch during the next two days that you continued to do your job?

A. Every third day we are working the four

(Testimony of Edmund E. Sundwall.)

hours and the other two hours you stood it two hours. I working two hours. In other words, like I steered today, tomorrow—no, the next day, I am day man, like I work four hours.

Q. Did you also stand a lookout on the fore-castle head?      A. Yes, sir.

Q. How often did you stand lookout?

A. Every night.

Q. And you continued to stand your lookout, did you, for several days?      A. No.

Q. Up until about the time you got to Okinawa, did you?

A. No, I couldn't take the wheel last day; I couldn't see good enough then.

The Court: We will take a five-minute recess.

(Recess.) [47]

Mr. Pinney: If your Honor please, the libellant was on the stand under cross-examination. I have a medical expert here, and it is agreeable with Counsel, if your Honor please, at this time to put him on and then resume the cross-examination of the libellant later.

Mr. Cooper: That is agreeable.

The Court: Very well.

Mr. Pinney: Doctor Bricca.

DR. CONSTANTINE R. BRICCA, JR.  
called as a witness in behalf of the libellant, being  
first duly sworn, testified as follows:

The Clerk: State your name for the record.

A. Constantine R. Bricca, Jr.

Direct Examination

By Mr. Pinney:

Q. You are a physician duly licensed to practice your profession in the State of California?

A. I am.

Q. And in what year were you licensed to practice in this State?      A. In June of 1942.

Q. And of what medical school are you a graduate?      A. University of Cincinnati.

Q. Following your graduation from the University of Cincinnati have you done any post-graduate work? [48]

A. I took a year of rotating internship at Highland Alameda County Hospital in Oakland, and I took my eye training at Stanford University Hospital.

Q. And have you been specializing in a particular field?      A. Eye.

Q. How long have you been specializing in the eye field?      A. Since 1943.

Q. And have you been constantly engaged in practice in that particular field since 1943?

A. Yes.

Q. Did you have any military service during the last war?      A. Two and a half years.

Q. And that was in what branch of the service?

(Testimony of Dr. Constantine R. Bricca, Jr.)

A. The AUS, Army of the United States Medical Corps.

Q. Was that practice in connection with your specialty?

A. Yes, general hospitals; I was at Dibble.

Q. Doctor, have you made an examination of Edmund Sundwall, the libellant in this case?

A. I have.

Q. Will you tell the Court the nature of the examination made by you.

A. Well, I saw him yesterday afternoon in my office and again this morning, and I checked his vision, examined him as thoroughly as possible under the circumstances; examined the fundus of the right eye, couldn't see the fundus of the left eye. He has a [49] scarred area in his left cornea which makes it impossible to see farther into the eye.

Q. Now, in addition to the examination that you made yourself, Doctor, you have briefly reviewed the files of the Marine Hospital which have been introduced in evidence in this case, have you?

A. I have.

Q. And you have noted from that examination those matters in that record which you feel are of significance in this particular case, have you, Doctor?

A. Yes.

Q. And Doctor, directing your attention entirely to the left eye, what did you find in your examination of the patient?



(Testimony of Dr. Constantine R. Bricca, Jr.)

A. Well, Mr. Sundwall has marked corneal vascularity of his left eye.

Q. What do you mean "corneal vascularity"?

A. Invasion of the cornea, which is normally a clear, window-like substance, with blood vessels which render it semi-opaque. He has a circular graft and a corneal transplant as the result of one of his surgical operations, which has also become opaque.

Q. Did you notice anything else of significance to you in the left eye upon the examination, Doctor?

A. There are—there is a scarred area superiorly in the left eye, and there is degeneration of the superficial layers of the cornea in the left eye at about eleven o'clock right at the [50] limbus.

Q. That is a degeneration of what?

A. To what would correspond to the skin on the hand, the superficial layers of the cornea in the right eye. There is also some degeneration of these layers in the graft centrally.

Q. From your examination, Doctor, were you able to form any opinion as to the length of time these scars to which you have just referred on the cornea have been present on his cornea?

A. No, I wouldn't be able to state how long they had been present.

Q. You can't tell whether that had been of recent origin?

A. No, I would have to go to the accurate record.

(Testimony of Dr. Constantine R. Bricca, Jr.)

Q. How about this scarred area which you have described, Doctor?

A. That may have been present before or at surgery; I don't know. I will have to retract that statement. The surgical procedure was centrally. This scarred area could have been present before surgery. However, I didn't see the man; I can't say that it was or was not.

Q. You referred to this corneal vascularity, the presence of these blood vessels in the cornea.

A. Yes.

Q. Of what medical significance is that, Doctor?

A. Well, they are more of significance to the patient; actually, they indicate some irritative process in the eye which would [51] cause the entrance of blood vessels which are not normally present in the cornea and thereby cloud vision, make the cornea opaque.

Q. Doctor, what was the extent of the patient's vision at the time you examined him last night in his left eye?

A. In his left eye he could count fingers at a distance of one foot.

Q. Did he have sufficient perception for you to make any measurement of his vision in terms ordinarily used in the eye field?

A. Well, when a patient's vision is so restricted, we do not use the terminology 20/20 or 20/40, which is the common notation, it would be roughly 1/200 what would correspond to it, but we annotate it as counting the fingers.

(Testimony of Dr. Constantine R. Bricca, Jr.)

Q. From the examination that you made last night, Doctor, are you able to explain the reason for this diminution of vision? I mean, what factor in the eye was responsible for it?

A. Well, the immediate reason for his poor vision in his left eye is the opaqueness of the cornea, and he also has lens opacities in the eye.

Q. He has lens what, Doctor?

A. Opacities; in other words, he has a cataract.

Q. Doctor, you have reviewed the records of the Marine Hospital in connection with this man, have you? A. Yes. [52]

Q. Did they reflect what his vision was in his left eye over any period of time?

A. Yes, they do. With the hasty perusal I was able to make, I find that in 1946, according to the records, he had 20/40 vision in his left eye—with correction, that is 20/40.

The next time that the vision was stated was in November of 1948, at this time he had 20/80 in his left eye. Evidently just before he shipped out in March of 1949, he was again seen and there was a note made in the chart that he had lens opacities in his left eye but there was no note made of his vision.

When he was admitted to the Marine Hospital in June of 1949, a note was made that he counted fingers with the left eye at one foot, and the best correct vision was 20/300.

The Court: What do you mean by lens opacities? Do I pronounce it right?

(Testimony of Dr. Constantine R. Bricca, Jr.)

A. Opacities.

Q. How do you spell that?

A. O-p-a-c-i-t-i-e-s.

Q. What does that mean?

A. The lens is normally just the same as a glass or a lense in a camera; and if it isn't entirely clear, it has small opaque areas and that would make your vision poorer or not as good. And any opaque area in a lens is referred to by customary usage as being a cataract. [53]

Q. (By Mr. Pinney): By opaque, we mean, Doctor, with relation to what?

A. Well, an opaque—if it is totally opaque it will not transmit—light will not be able to pass through it. If it is partially, it will be translucent and not transparent. It is a matter of terminology.

Q. In the ordinary process of the use of the eye, is it necessary that light pass through the lens in order that vision be obtained?

A. Yes, clear vision, yes.

Q. And the effect of opacity of the lens would be what on vision? A. To decrease it.

Q. It would decrease it. Now, Doctor, you referred to some scarring? A. Yes.

Q. That you found upon the cornea?

A. Yes.

Q. Do the Marine Hospital records you have examined make any reference to any scarring?

A. Well, his history does here as given in 1946, that he had rust in his left eye in 1933, with recurrent inflammations in this eye. It also gives some



(Testimony of Dr. Constantine R. Bricca, Jr.)

history of his right eye, which I imagine we can dispense with.

Q. Yes, I think so, Doctor, at least I have been interested in [54] the direct examination in the left eye.

A. All right. At this time in the left eye they said there was a scar, and in 1948, in November, there is a picture here in the record by the medical officer of scarring of the cornea of the left eye.

Mr. Cooper: Excuse me. May I just interrupt?

A. Yes.

Q. What was the date of that, Doctor?

A. This last one?

Q. The last entry you were reading?

A. November the 3rd, I believe, 1948. And there is a picture of the scar and evidently they could see into the eye, because he could see out. And then in March there is another note that they contemplated doing surgery on the right eye, but they said they would rather wait, since he was having some difficulty, and his vision seemed adequate at that time to let him ship out. It so states in the notes here, anyway.

Q. (By Mr. Pinney): Directing your attention to that scarring on the cornea to which you have just referred. A. Yes.

Q. I think it is November, 1948. A. Yes.

Q. Is there any additional mention of scarring subsequent to 1948, in the Marine Hospital records?

A. Well, let me see. [55]

Q. That would be scarring of the left cornea.



(Testimony of Dr. Constantine R. Bricca, Jr.)

A. This is the admission of June 24, 1949. I will read you the history.

Q. Yes, all right.

A. "This fifty-five year old white male entered the hospital with a history of having rust lodged in his eye in 1933, which has been followed by occasional episodes of inflammation of the eye since that time. He also incurred trauma of the right eye in January, 1943, which resulted in a traumatic dislocation of the lens and traumatic cataract of the right lens. In April, 1949, heavy, compound oil from the ship got into his left eye, causing an inflammation and increasing cloudiness of vision of that eye. He was hospitalized in Okinawa in the U. S. general Army hospital from May 10th to June 14th. Prior to admission to this hospital he was treated with Homatropine 1% four times a day, and Sulfathizole 5% four times a day, as well as hot compresses."

Further on "Hospital Course" they operated on his right eye and it was noted during the hospital course that the vision in the left eye did not improve materially. That is all the notes there. Oh, Doctor Ridgeway cauterized the vessel or one of the blood vessels leading into the scar of the left eye. That also makes it opaque because that may cause further scarring of the eye. And then he was dismissed from the hospital. He was to [56] return every two or three weeks, to be followed by Doctor Nicholson.

(Testimony of Dr. Constantine R. Bricca, Jr.)

Q. Doctor, what I had in mind was this problem of scarring on the left cornea. A. Yes.

Q. You have a record of scarring, that was November, 1948, in which there was a drawing of the scar. Are there any other drawings subsequent to November, 1948, of the scarring of the left cornea?

A. If there are, they are not in the record.

We have a further record here, February, 1950, February 7th. It says: "This fifty-six year old patient splashed oil in his left eye in April, 1948. Vision has been poor in that eye since that time, objects appearing foggy. Patient depends on left eye for guidance." He states he has a corneal opacity on his left cornea, and that is all.

Q. Doctor, in your examination you have referred to some scarring? A. Yes.

Q. Is the scarring that you found on the left cornea the same scarring that is indicated in that November of 1948, examination? A. No.

Q. Will you tell us what the difference is, Doctor?

A. There is a tremendous difference, because there has been [57] an operation also, so it makes it impossible for me to accurately follow what has happened. According to the records here, his vision has decreased from March of 1949, to June of 1949, and after that time he had two corneal transplants, and he has scars—operative scars—they are now. So I don't know what he looked like before he was operated on.

Q. Doctor, what would be the effect of the cor-

(Testimony of Dr. Constantine R. Bricca, Jr.)

neal scar as indicated in the diagram drawn in November, 1948, upon his vision?

A. Well, as accurately as I can answer that again from the position of the scar in this diagram, it wouldn't be materially—I can't say; I just—he had vision at that time, we know his vision was 20/80 at that time, which is enough to get him around.

Q. What I have in mind is this, Doctor, with that scar standing by itself and without any super-intervening effects of any kind, would you medically expect his vision to remain constant in that left eye or would there be a change?

A. Well, from the position of the scar according to this diagram, one was able to see into the eye; they made notes of examinations into the eye, so evidently you could look around and the patient could see out. He was ambulating by himself, so evidently the scar did not materially impede him. He had had the scar since 1933.

Q. In the record there is some history of opaque-ness of the [58] cornea following April, 1949, is there, Doctor?

A. Yes.

Q. What factors ordinarily cause opaqueness to develop on the cornea? What is the cause of that?

A. There are many factors—irritation, infection, burns, thermal burns; any number of conditions may cause that—disease processes.

Q. Is there in the history that you have examined at the Marine Hospital, or in your examination of the patient, anything to indicate that there was a

(Testimony of Dr. Constantine R. Bricca, Jr.)  
disease in the left eye which would cause a corneal opaqueness?

A. Well, according to the record, there is no history of diabetes, syphilis or penetrating wounds. The only history we have is that of rust in the eye in 1933, and his subsequent difficulty with the oil in his eyes aboard the ship.

Q. Doctor, in your opinion as an eye specialist, would introduction of oil in the eye as it was in April of 1949, as disclosed by your examination of those hospital records be likely to result in a corneal opaqueness?

A. Well, to answer the question with any degree of fairness I would have to know what was in the oil. There are all kinds of substances, I don't know.

Q. Let me ask you assume this, Doctor, in your answer: Assume that the witness has testified that when the substance entered his eye it burned. Now, assuming that we have, without [59] knowing what the substance is, that it was some substance that burned his eye, can you with that information alone say with any reasonable probability that it could result in corneal opaqueness?

A. Yes, if it were an irritating substance it could result in corneal opacity—corneal opaqueness.

Q. Would the introduction of any irritating substance possibly result in corneal opaqueness?

A. It is possible, yes.

Q. In your experience, Doctor, in treating eye cases, have you had occasion to treat any number



(Testimony of Dr. Constantine R. Bricca, Jr.)

of cases where there has been a corneal opaqueness introduced by an irritation?

A. Yes, I have seen and treated patients with keratitis following a burn—corneal burn.

Q. Will you say a corneal opaqueness following irritation is a common experience?

A. It depends on the severity of the burn and the resistance of the patient and the treatment. I mean, there are any number of variables.

Q. I appreciate that, Doctor. In your opinion, Doctor, could the condition which you now find in the left eye of Mr. Sundwall have been caused by the injecting into the eye of some substance that irritated it?

A. I will have to answer your question in a round-about fashion and qualify my answer. [60]

Q. Doctor, I want you to answer it—

A. From reading these records, it is obvious that he was being treated for something; evidently he did have a burn of some type, because he was treated for six weeks in the Army hospital in Okinawa, one place and the other, and when he came out his vision had decreased. I came across a statement here as to the location of this corneal scar on his return, I have lost it, some place in the record, and it said the corneal scar was centrally located, which it was not before. With all these factors in mind, I would think that there is some good evidence to believe that the chemical burn incurred by this substance had caused increasing corneal opacity.

Q. Then you did find some reference to a corneal



(Testimony of Dr. Constantine R. Bricca, Jr.)

scar subsequent to this accident which was in a different position than the November, 1948, one?

A. It is the same eye.

Q. This November, 1948, scar was located where, according to the diagram?

A. It is here on the diagram.

Q. It says twelve o'clock?

A. It says, "scar left cornea at eleven o'clock" right here, but there is a picture, so that is a little more graphic.

Q. And the subsequent scar is somewhere in the center?

A. That is what the record shows.

Q. This condition you observed personally in the left eye of [61] Mr. Sundwall, Doctor, do you think that is a static condition, or it is likely to improve with time or get worse?

A. Well, I should answer the first part of your question, I don't believe it is a static condition. These things continually change. As to whether it has gotten better or worse, you would get a much better answer by questioning the man who is taking care of him immediately; I can't answer that question.

Q. The hospital records you have examined show a series of three operations?

A. Yes.

Q. They are two corneal patches and one to the iris; is that right?

A. That is from the hospital record. I haven't gotten that far in the record.

Q. What is the ordinary practice for a corneal patch?

(Testimony of Dr. Constantine R. Bricca, Jr.)

A. A corneal transplant—there are a number of reasons for using that type of operation. In this sort of a case it would be to remove a scarred area and put in a clear area so the man can see.

Q. And there have been two of these, Doctor, indicating that the first one was not too satisfactory. Is that common or uncommon that when you do one of those transplants that you do not have too good a result?

A. The answer will again have to be qualified. These things are, according to statistics, rated in four classes, and in most [62] cases with burns of the cornea or irritative lesions with blood infiltration are notoriously poor in response. You have a poorer chance to get a good result.

Q. You have mentioned some blood vessel infiltration which you found in the cornea in this left eye.

A. Yes, there is a note on it that there were blood vessels——

Q. Can you describe the extent of that? Is it moderate or severe?

A. It is fairly well marked vessel infiltration of the cornea.

Q. With the state of the blood vessel infiltration as you have observed it——

A. Yes.

Q. ——on your last examination, Doctor, do you think—can you say with any certainty, whether or not an additional patch of that cornea would clear up the opaqueness you have discovered—or transplant, I am sorry.

(Testimony of Dr. Constantine R. Bricca, Jr.)

A. Well, now, I think the question would much better be put to a man who is more qualified in that field than I. That is a very specialized field of work. There are two men actually in San Francisco—three—who do quite a bit of work, and their opinions would be much more valuable than mine.

Q. I take it the operation performed, I believe it was the last one, had something to do with the iris, is that correct?

A. That is what I was told. I haven't—

Q. Have you found the nature of that operation by your perusal [63] of the records?

A. No. Here it is 10/6/50.

Q. What was the operation performed on the iris, Doctor?

A. "To surgery, in a.m. for freeing adhesion anterior iris from graft." In other words, the iris pushes forward against the back surface of the cornea and the graft and has to be freed.

Q. What is the effect? Why does it have to be freed? What is the effect of the operation again?

A. You may have complications following the operation that would further the blood vessels growing from the iris into the cornea, so you would have more trouble.

Mr. Pinney: I have no further questions, Doctor.

#### Cross-Examination

By Mr. Cooper:

Q. Doctor, it is easier for me to start at the

(Testimony of Dr. Constantine R. Bricca, Jr.)

bottom, so I am going to ask you about that last iris operation.           A. Yes.

Q. I believe you said the iris had pushed against the cornea of the eye and that required that the pressure or something be removed; is that correct?

A. Yes.

Q. That was the purpose of this operation?

A. According to the record, that is what I would think, yes.

Q. So that I assume that had nothing to do with the condition [64] of the cornea itself, did it?

A. I can't answer that in any thoroughness.

Q. The answer is you don't know; is that correct?           A. That is right.

Q. I mean, you would have to follow the case and see what happened in order to tell, is that correct?           A. Accurately, yes, I would.

Q. Now, Doctor, you referred to a corneal opacity, which is nothing more than a scar, isn't it?

A. Yes, that is right.

Q. On the cornea of the eye. The scar was at eleven o'clock using the face of the clock?

A. Yes, according to this diagram here.

Q. And I believe, according to the diagram and according to your knowledge of the eye, they could see into the eye and he could see out of it?

A. Yes.

Q. That is what it amounts to?

A. That is right.

Q. Assuming there were no other complications,



(Testimony of Dr. Constantine R. Bricca, Jr.)

or conditions I will say, that would be a normal vision, would it not; is that correct?

A. Yes.

Q. Now you have said that there is some suggestion of a corneal opacity, I suppose, which was in a more central part of the eye [65] at one time. Is that correct or is it incorrect?

A. I don't believe I said that. You would have—because it isn't in the record here. No, I said there were lens opacities.

Q. Oh, lens opacities? A. Yes.

Q. I misunderstood you then, Doctor. There was lens opacity. And what does it indicate in that regard?

A. That he had a beginning cataract in the left eye.

Q. And a cataract of course forms on any eye after you get along in years?

A. Maybe so, maybe not.

Q. It isn't an uncommon thing?

A. No, it isn't uncommon.

Q. As a matter of fact, eye specialists do not know the cause of it, do they?

A. That is true.

Q. When you have a cataract on one eye, although you don't tell the patient, you anticipate a cataract on the other eye, do you not?

A. It all depends whether you know the reason for the cataract on that first one.

Q. It is a very common occurrence among people beyond fifty that where you have an operation



(Testimony of Dr. Constantine R. Bricca, Jr.)

on one eye that sooner or later you will have a cataract operation on the other?

A. I don't think you can state it categorically, but it isn't [66] uncommon, as you say.

Q. I believe you have told us that, according to that record too, at one time the hospital doctor was of the opinion that the man could return to work; is that correct?

A. I stated that he was seen on 3/11/49 when he went evidently to see about his right eye.

Q. Yes.

A. And the statement of the medical doctor is "It is determined that it would be better to postpone any surgery since vision of the left eye is adequate on light projection the upper field is absent." This refers to light projection on the left eye. "Left eye, scarring of cornea deep with some synechia and pigment therein. Small area of cataract forming in left lens. No further treatment at this time."

Q. You found at the time of your examination of this man which took place yesterday afternoon, Doctor, that there was blood vessel infiltration fairly well marked?

A. Well marked, yes.

Q. You don't know when that occurred, I suppose?

A. No, I do not.

Q. You have no way of knowing?

A. No, I don't. I can say that it didn't occur yesterday, but I can't tell you when.

Q. I see. Can you say also that you don't know the cause of it? [67]

(Testimony of Dr. Constantine R. Bricca, Jr.)

A. I cannot say absolutely the cause, yes, that is true.

Q. It is a thing that occurs not infrequently with an eye, is it not? A. Yes.

Q. And does it have a variety of causes like you have told us, I believe, that a corneal opacity has; that is, it might be any one of five causes?

A. Oh, yes, the causes may be varied.

Q. May be varied. As a matter of fact, now, Doctor, the cornea of the eye, contrary to the common belief, is quite tough, is it not—that covering on the eye, the cornea?

A. Well, in respect to—it all depends what you compare it to.

Q. Well, compared to the skin not on the palm of your hand but the skin on the back of your hand?

A. It is a very durable—it is a very resistant substance.

Q. And it has some thickness, does it not?

A. Yes.

Q. It is designed, according to your doctors' belief, is it not, as a protection against the eye—I mean as a protection for the inner part of the eye?

A. Oh, I don't know whether you could state it that way; it serves incidentally as a protection. It is designed actually as a window and as a light bending area. It acts somewhat as a lens. [68]

Q. To give a different refraction, is that right?

A. It refracts light, yes.

Q. Doctor, you have told us, and I am sure very honestly, that it would be difficult to tell at this

(Testimony of Dr. Constantine R. Bricca, Jr.)

late date as to whether a particular substance would cause scarring of the cornea.

A. Do you mean this particular substance or any particular—some particular substance we can state they always cause it.

Q. Like caustic soda? A. Surely.

Q. Or sulfuric acid? A. That's right.

Q. But if it is mildly irritating—I will put it that way—you can't say whether that would be the cause of a scarring of the cornea, would you? Mildly irritating?

A. I can't answer your question in all fairness. It may be answered easier, it depends on the state of the eye, if it were a previous diseased eye, if it were treated promptly—there are so many variables, I can't answer your question.

Q. I see. That is what I want, Doctor. You say assuming there was an irritation that went in there, Doctor, and you have used the expression "treated properly." Would you say that proper treatment would involve immediate attention?

A. Any injury to the eye should have immediate attention.

Q. That is, even for as long as twenty-four hours would be a [69] very bad thing for the eye, would it? A. Yes.

Q. You have mentioned several causes—I didn't make a note of them all, but you mentioned, I know, irritation, infection, and trauma. That is, trauma is something distinct and different from irritation?

A. Trauma may result in irritation.

Q. Trauma may result in irritation. When you

(Testimony of Dr. Constantine R. Bricca, Jr.)

say trauma, you mean some physical force applied to the eye doing we will say substantial damage, is that correct?

A. Now, Doctor, if some drops of a substance such as paint splashed up in the eye would you anticipate that that would cause any serious physical damage?

A. It may, yes.

Q. It may? A. Yes.

Q. But ordinarily won't?

A. It usually results in chemical burns. There are all different kinds of paints again.

Q. All different paints. It would depend on the type of paint? A. Certainly.

Q. What you have said then it might cause some kind of irritation rather than hurt from the blow itself is what I am trying to ask you. I may be wrong.

A. Yes. [70]

Q. But I have in mind a case, one like I would stick a sharp instrument in a man's eye and that would cause physical damage to the cornea?

A. Yes.

Q. The other one is I may throw acid at him and that would cause irritation?

A. That causes more than irritation; it causes physical damage; it causes burns.

Q. I am using them as illustrations. One is physical damage from the force of the blow?

A. Yes.

Q. And the other is irritation, I suppose?

A. Or an actual burn, let us call it that; not an irritation.



(Testimony of Dr. Constantine R. Bricca, Jr.)

Q. My question is really directed as to the first, from the mere impact, drops of paint or oil, whichever it was, wouldn't cause serious damage?

A. Not unless they were thrown with violent force.

Q. If it just flashed up in your eye?

A. The actual impact would probably cause no damage.

Q. If there is any damage to the eye at all it would be because—assuming it wasn't thrown with a lot of force, it would be traceable to the irritation if the substance was an irritating substance?

A. Yes.

Q. And not knowing the exact nature of the paint or oil, whichever [71] this substance was, you couldn't say whether it would be sufficiently irritating to cause serious damage resulting in an ulcer to the eye?

A. That is true; I can't make that statement.

Q. So the real damage—I mean the scar tissue—can you state was the result or caused by a ulcer on the eye, Doctor?

A. We do not have an actual record of opacity when he was first seen in Okinawa; all we have is what it looked like when he got back, and he had a scar.

Q. And that was at eleven o'clock, as you have told us, according to the record?

A. No, not as far as can see. The scar was central, when he came home. According to this now—in other words, he couldn't see clearly because there



(Testimony of Dr. Constantine R. Bricca, Jr.)  
was a scar in his way when he was taken to the Marine hospital here.

Q. And then on November 3, 1948, the only scar indicated by the record was that one at eleven o'clock?

A. That is what the record says.

Q. That is what the record indicates?

A. That's right.

Q. Then, Doctor, would it be a fair conclusion to draw that the other scar or opaqueness had disappeared at that time?

A. Which other scar? I don't follow your question.

Q. You said that one was more central, I believe you told us [72] from the record than the one you refer to as indicated on the record as being at eleven o'clock.

A. One was peripheral, this record describes it.

Q. Peripheral; that is on the margin?

A. That is right.

Q. That is November 3, 1948?

A. That is right.

Q. 1949, rather?      A. '48.

Q. '48. Excuse me a minute.

Mr. Pinney: That was before this voyage. That was before this accident.

A. Correct.

Mr. Cooper: Oh, I see. I am sorry; I didn't get the date, your Honor. That was in November, 1948, before this accident?      A. That is correct.

(Testimony of Dr. Constantine R. Bricca, Jr.)

Q. On board the Iran Victory?

A. Yes.

Q. That was the eleven o'clock scarring?

A. So it says.

Q. And what was their indication when the first examination was made of the eye when he went to the Marine hospital in 1949?

A. All right. Let me see; I will try to answer your question. The first note here says, "corneal opacity and vascularity left. [73] Left pupil appears round and reacts to light."

Now just a moment. Then they made the note that the vision in the left eye did not materially improve. On October 29, Doctor Ridgeway cauterized the vessel leading into the leukoma of the left eye.

Now let me see if I can find a better description of this. No. It says here, "eye examination"—that is referring to the left eye—"corneal opacity and vascularity left. Fundiscopic examination not possible." In other words, he couldn't see into the eye. This was the time he had his right eye operated on. And that is all of it. Wait a moment here. Oh, here is where I read before.

"6/25/49"—the day after he was admitted. "Tension"—ocular tension—"McLean left eye is 30—within normal limits. Counts fingers left eye at one foot by the window light. No straining left cornea. There is a dense leukoma left cornea with depressed center and some fascularization of edges. Right eye"—"vision left eye—6/28 6/300—best correction 20/30"—excuse me 20/300.

(Testimony of Dr. Constantine R. Bricca, Jr.)

Q. That was a correction?

A. That is right, 20/300. Doctor Schafer sees the patient and they operated on his right lens following this and removed the cataract in the right eye. I am trying to find something about the——

Q. May I ask you what that fascularity means, Doctor?

A. Blood vessels going into the area. It is an indication of [74] activity.

Q. You said something about a deep scar there?

A. Yes.

Q. Or as I got it, a deep opacity?

A. Yes.

Q. Could that be caused, Doctor, as you have told us a while ago from a variety of things?

A. Yes.

Q. Is that an ulcer condition?

A. Well, it may be caused by an ulcer, yes.

Q. You said on direct examination that the cauterization would cause further scarring; is that correct, that was performed at the Marine hospital?

A. It might.

Q. The cauterization performed at the Marine Hospital would cause further scarring?

A. No, no. I didn't say that.

Q. I understood you to say so.

A. I will have to qualify it and get a little technical. Blood vessels grow into the corneal window, and they are cauterized back of the cornea right at the junction of the cornea with the other part of the eye—we call it the limbus—and that may result

(Testimony of Dr. Constantine R. Bricca, Jr.)

in a small scar way in the periphery, way up out on the edge. That would not increase the scarring centrally, because that would be definitely what you do not want to do. [75]

Q. Doctor, in order to clear up my own understanding, you say the record indicates in 1946 there was 20/40 vision in the left eye, I believe that is correct?

A. In 2/26/46, right here, yes.

Q. And in November, 1948, there was 20/80?

A. November 3, 1948, it states here—wait a moment; I will have to read these things. November 3, left eye, 20/80, yes.

Q. The normal eye is 20/20, or 10/10 as it is called, is it not? A. Yes.

Q. Am I correct in believing from 20/40 to 20/80 it had gotten twice as bad?

A. No, no, it isn't a fraction; it is a statement of physical properties. It means that at twenty feet he see what a normal person would see at forty feet. It isn't a percentage-wise thing. The actual vision decrease from 20/20 to 20/40—I believe it is not stated correctly; it is an approximation, it is around 20 or 25 per cent less vision.

Q. It had deteriorated at any rate?

A. He didn't see as much.

Q. In March of 1949, according to my notes here he had lens opacity in the left eye?

A. That is right.

Q. And opacity of course there means the same



(Testimony of Dr. Constantine R. Bricca, Jr.)

as it does in the cornea; it means you can't see through it? [76]      A. That is right.

Q. And opaque just simply means you can't see through it, is that correct?

A. Yes. It doesn't indicate the degree of opacity.

Q. But as you have pointed out, there is clear, there is translucent and opaque?

A. Yes, but the lens is an opaque substance, and a little tiny area makes an opacity. It is very confusing, actually.

Q. You can't tell by looking at it the particular area which is opaque, is that what you mean?

A. Not according to the record, and it varies with the individual how much it obstructs his vision.

Q. But it does decrease the ability to see, I will put it that way?

A. True, if it is in the central portion of the lens.

Q. So far as you know, you can't say one way or another you can't say whether this is caused by the irritation—the scar?

A. I can make no statement.

Q. The probabilities are it was not, is that right?

A. I can make no statement; I don't know; I can't answer the question.

The Court: I would make the observation that I think the Doctor has thrown about as much light as it is possible for him to do upon this situation.

Mr. Cooper: Your Honor, I want to get this thoroughly [77] decided. If you feel that he has, I will terminate my cross-examination.

Mr. Pinney: I have no further questions of this Doctor.

The Court: The Doctor may be excused.

We will adjourn now until two o'clock.

(Thereupon a recess was taken until two o'clock, p.m.) [77A]

Afternoon Session, Wednesday, February 14, 1951

The Court: Proceed, gentlemen.

EDMUND E. SUNDWALL

resumed the witness stand, and having been previously sworn, testified as follows:

Cross-Examination

(Resumed)

Mr. Pinney: Do you wish to continue the cross-examination of the libellant, Mr. Cooper?

Mr. Cooper: I am going to ask the reporter to give me the last question.

(The reporter read the record as requested.)

By Mr. Cooper:

Q. Now, Mr. Sundwall, you told us you went ashore at Okinawa and then you went to the Army hospital. A. Yes, sir.

Q. And you saw a doctor, of course?

A. Yes, sir.

Q. And he made an examination of your eye. Will you tell us what he said about your eye?

A. Well, he says, "Forget the ship and forget

(Testimony of Edmund E. Sundwall.)

the cargo; forget everything." He said, "I will have an ambulance take you to the hospital." That is all he told me—and the dispensary. So they took me to the hospital then.

Q. You went to the hospital. I believe you told that they just put [78] drops and bandages on your eye in the hospital.

A. Yes, I came in very late that night.

Q. Did the doctor at the hospital tell you what was wrong?

A. He did not.

Q. He did not?

A. Not that I know of. He might have. I stated to him how it happened.

Q. You stated to him how it happened?

A. Yes, sir.

Q. Now, Mr. Sundwall, you have described in a limited way that your eye burned some. You told us that you did yourself, without taking anybody with you, you went and washed it out?

A. Yes, sir.

Q. How did it feel after you washed it out?

A. Well, I guess it were relieved, I suppose, somewhat.

Q. At any rate you supposed it was relieved. It was relieved or you would not have gone back to work again, would you?

A. I guess it would be relieved to get some oil out.

Q. Pardon me?

A. I imagine it was some relief to get some of that oil out of my eye.

(Testimony of Edmund E. Sundwall.)

Q. Just how did you wash it?

A. I just put the luke warm—cold and hot water together, make it luke warm, put it on my face.

Q. Put it on your face and wash both eyes [79] out?

A. Yes.

Q. Did this oil get in both eyes?

A. The only thing I know is only one eye was burning, was sore.

Q. That relieved it and you went back to work again?

A. Yes, sir.

Q. As a matter of fact, it didn't bother you any for a couple of days, did it?

A. Oh, well, that was a little sore all the time, dying out slowly.

Q. A little sore, but it wasn't sore enough that you were concerned about it, were you?

A. Well, some time after that happened, I thought it would be all right, and when I went to the clerk aboard the ship he never mentioned anything that it was anything serious. He told me that these eye drops was too strong, so he gave me some salve.

Q. That is after you went to see him?

A. Yes.

The Court: That was the purser, was it?

Mr. Cooper: Yes, I believe he said the purser. That is the way I understood him.

Q. Is that the only sensation you had now, Mr. Sundwall. a burning sensation?

A. Just sort of a burning sensation.

Q. A stinging sensation? [80]



(Testimony of Edmund E. Sundwall.)

A. Yes; it got worser and worser after—I imagine when I was laying in the hospital, then it got worser and worser.

Q. When you went to the hospital?

A. During the time I was laying in the hospital the eye got worser and worser, very painful.

Q. As a matter of fact, when you did go to the purser, without asking you when you did go to him, didn't he roll back your eyelid and look at the eye?

A. He might. I guess he did maybe; I don't know.

Q. You don't recall just exactly what took place, is that it?

A. No, I wouldn't say if he did or not. The only thing I know——

Q. As a matter of fact, Mr. Sundwall, if the purser testified that you did not go to see him for six days, would you dispute that?

A. Yes, I dispute that, because I can't see how the oil could have been in the eye and the eye drops six days afterwards.

Q. That was the next day now; is that your best recollection?

A. No, I believe it was the first day, because——

Q. You believe now it was the first day?

A. Yes.

Q. But when you testified a little over a year ago, you thought it was the second day, didn't you, then?

A. Well, then——

Mr. Pinney: I think his testimony in that re-

(Testimony of Edmund E. Sundwall.)

spect speaks [81] for itself, your Honor, whatever he said.

Mr. Cooper: I guess that is correct.

The Court: All right.

Q. (By Mr. Cooper): The record here from the Marine Hospital, Mr. Sundwall, shows that your sight was impaired or not as good as normal sight in 1948. Do you remember going to the doctor in the United States Marine Hospital then?

A. In 1948?

Q. Yes, November, 1948.

A. I suppose that is the time about the cataracts that I went up there to see him.

Q. That is the time they looked at your eye and found that it was 20/80, as they described it?

A. That might be, I thought it was in December or January.

Q. You are not sure about that? A. No.

Q. That was your left eye, though, wasn't it?

A. I beg your pardon, sir?

Q. That was your left eye that they looked at?

A. No, my right eye.

Q. Your recollection is that you went to see about your right eye, is that it?

A. No, I found out through a gentleman who told me I had a cataract or something in my eye and I should go up to the doctor and see about it. The next day I went up to the Marine Hospital. [82] I don't know that it was in November; I always thought December or January. I never thought much of it at that time anyway.

(Testimony of Edmund E. Sundwall.)

Q. Now, did you bathe your eye after the first time, Mr. Sundwall?

A. The first time I what?

Q. You went to the forecandle and bathed your eye, washed your eye in luke warm water, you said?

A. Yes, sir.

Q. Did you wash it after that?

A. After I were finished with the work I had to cleanse it, because there was a lot of oil and you couldn't do that with water. I had to use some kind of lava soap to get the rest of the paint off my face.

Q. That was after you went to the shower after you were off watch?

A. Yes, after.

Q. You just gave yourself a general bath at that time?

A. Well, I don't know; they just came over and asked if I preferred water in there.

Q. What I meant when I asked you was, whether at any time after the first time you washed your eyes to get the oil out, if you washed your eyes especially at any other time?

A. No, no, the purser did that. The purser washed my eye out with that borax or whatever it was in the eyeglass.

Mr. Cooper: Will the Court excuse me just a moment? I [83] realize I am going a little slow.

Q. Besides steering the vessel and looking at the compass, of course you had to go up what they call ladders on the ship to get up to the bridge?

A. Yes.

(Testimony of Edmund E. Sundwall.)

Q. How many decks is that above where you bunk?

A. It is one, two, three—three.

Q. About three decks? A. Yes.

Q. You go up and down ladders, do you?

A. Yes.

Q. In order to get to the bridge? A. Yes.

Mr. Cooper: I believe that is all, your Honor.

### Redirect Examination

Mr. Pinney: I have just one or two questions I would like to put to the witness on redirect examination.

By Mr. Pinney:

Q. When you first saw the purser did you tell him what had happened? A. Yes, sir.

Q. And if he made any written report of what you told him, did he show it to you?

A. He never mentioned anything about me or any report or anything; the only thing he did was clean my eye out.

Q. So you don't know what the purser did? [84]

A. No, sir.

Q. Did you report this to anybody other than the purser, any of the officers of the ship?

A. I told the second mate on the watch, or the third mate on the watch, that I got oil—paint in my eye. He said it is too bad. Then I reported I can't see to steer after that.

Q. When did you report that to him?



(Testimony of Edmund E. Sundwall.)

A. I reported that—I had the first wheel Sunday morning some days after the accident. I says, “I can hardly see the compass anymore.” He says “Just stick it out; in a few minutes you will soon be relieved.” We only steer one hour and twenty minutes; we divided four hours in three parts there. That night I went up I could see better than I could before, because that is the only number——

Q. That is one of your superior officers?

A. I told the third mate then, “It is impossible for me to do it anymore.” So he reported it to the chief mate or the captain, whoever it was.

Q. After you first saw the purser and he gave you some treatment, did you eye get better then or did it stay the same, or did it get worse?

A. I guess it was about the same; maybe it was relieved; maybe it felt better for some time. I can’t recollect exactly that. I know my eyesight started to fade and it was sore. I got better certain days, maybe, and got worse again. [85]

Q. How much were you making as a seaman? What were you making? How much money?

A. How much money?

Q. How much money a month?

A. I were making \$233.50 a month.

Mr. Pinney: Thank you. I have no further questions.

#### Recross-Examination

By Mr. Cooper:

Q. Mr. Sundwall, you said you couldn’t do it



(Testimony of Edmund E. Sundwall.)

anymore; I didn't quite catch it. That was just before you arrived at Okinawa you told the third mate that you couldn't stand your watch anymore?

A. Yes.

Mr. Cooper: I am going to show Counsel this accident report.

Q. I am going to show it to you, Mr. Sundwall. Can you read it?

A. No, I can't. You better read it to me.

Q. I see I am going to have difficulty. Can you see your name here—I mean what appears to be your name on that, Mr. Sundwall, down at the bottom of that paper?

A. No, no, no, I can just make out the paper.

Q. You can't see well enough to identify your signature? A. No.

Q. Isn't it a fact now—I want you to search your recollection—that after this purser made out this report of personal injury that he read it over to you and asked you to sign it? [86]

A. Not that I can recollect. I don't remember him making any—I suppose they have to make a report of an accident.

Q. Yes, they do.

A. I don't know if they did or not.

Q. You don't remember whether you did or not?

A. No.

Q. You have had an accident on board ship before, haven't you?

A. No, sir, except in '33, and there was nothing

(Testimony of Edmund E. Sundwall.)

to it; I just went to the doctor and back to the ship again.

Mr. Cooper: I wonder if I could see the original complaint or libel in this case. If the Court please, I am going to offer this in evidence. The paper appears to be signed, and we have for comparison the original complaint with his signature. Your Honor will appreciate the difficulty I am in here. I will ask that that be compared to the signature on the libel.

Mr. Pinney: If your Honor please, we do not wish to interpose any objection to the admissibility on the grounds that Mr. Sundwall cannot identify that as his signature. I don't know whether it is or not. If Mr. Cooper believes it is, if it looks fairly like the signature on the libel and your Honor feels that it is his signature, we will interpose no objection.

The Court: I want the record to show that this Court is not an expert on handwriting, but from all appearances the two signatures are the same. In the absence of any objections, I will admit it into evidence. [87]

Mr. Pinney: We will make no objection.

The Court: Well——

Mr. Cooper: The record will show that it is admitted as Respondent's next in order.

The Court: Without any objection.

The Clerk: Respondent's Exhibit B in evidence.

(The report referred to was marked Respondent's Exhibit B in evidence.)

(Testimony of Edmund E. Sundwall.)

Q. (By Mr. Cooper): You have just told us—it wasn't gone into on direct; you told us on redirect that you did report this accident to the third mate.

A. Yes, when I went to stand the wheel.

Q. When you went to stand the wheel?

A. Yes.

Q. But there are two men on board the ship that it is customary to report accidents to, are there not; one is the purser and the other is the first mate?

A. Yes, but of course the third mate was on my watch and saw the eye was inflamed and things like that. I suppose I told him.

Mr. Cooper: I want to move to strike that out, what he supposes.

The Court: It may go out.

Mr. Cooper: I believe that is all.

Mr. Pinney: I have no further questions. Step down, Mr. Sundwall. [88]

If your Honor please, that is the libellant's case.

Mr. Cooper: I am going to ask the mate to take the stand, if the Court please.

### WALTER E. BRUNSCH

called as a witness in behalf of the libellant, being first duly sworn, testified as follows:

The Clerk: Will you state your name for the record, please.

A. Walter E. Brunsch.

(Testimony of Walter E. Brunsch.)

Direct Examination

By Mr. Cooper:

Q. Mr. Brunsch, where do you live?

A. 2415 - 37th Avenue, San Francisco.

Q. What are you doing at the present time?

A. I just finished a job as night relieving officer on the S.S. Mount Furishima.

Q. What company operates that ship?

A. Pacific Factors.

Q. What license do you hold, Mr. Brunsch?

A. Master.

Q. And how long have you held that?

A. Approximately eight years.

Q. How long have you gone to sea?

A. About eighteen.

Q. About eighteen years. Were you mate of the Iran Victory on the voyage commencing in early April, 1949? [89]

A. Yes.

Q. And that voyage was concluded about when?

A. Oh, I wouldn't be able to state offhand.

Q. Do you remember a seaman serving on there by the name of Sundwall that had trouble with his eye?

A. I remember a seaman by that name that was left in Okinawa due to some eye injury.

Q. Did he personally ever report the accident to you? A. No.

Q. I suppose you learned it in ordinary course through the purser, is that correct?

A. That is right.



(Testimony of Walter E. Brunsch.)

Q. Mr. Brunsch, do you recall that on that boat you used what was called Texacoat to put on the decks of the ship? A. Yes, sir.

Q. Is that something that is commonly used on board vessels to put on a deck?

A. Yes, sir.

Q. You weren't present when Mr. Sundwall and two seamen were getting oil or this combination of material out of a drum on the deck on the 8th of April, were you? A. I was not.

Q. I mean the 28th day of April, pardon me. You weren't present? A. No, sir. [90]

Q. You know of no accident that happened to Mr. Sundwall? A. No, not at that time.

Q. You recall that, I suppose, Mr. Brunsch, that Texacoat comes in a drum? A. Yes, sir.

Q. And will you tell us whether or not in your eighteen years' experience on board vessels you have ever seen a pump used to get material of this general character out of a drum?

A. No, I have not.

Q. How long were you on the Iran Victory, do you recall? A. Very close to two years.

Q. Was there ever a pump on board the Iran Victory during that period?

A. Not for that purpose.

Q. Will you tell us whether or not the ships you have been on ever provided a pump for the purpose of getting material like Texacoat out of a drum?

A. No.

Q. Did you ever know of anybody to get any of

(Testimony of Walter E. Brunsch.)

that in their eye in your experience on board ship?

Mr. Pinney: I will object to that, your Honor. That is pretty far-fetched.

The Court: Objection sustained.

Mr. Cooper: I believe that is all. [91]

### Cross-Examination

By Mr. Pinney:

Q. Mr. Brunsch, are you familiar with this product Texacoat? A. To a certain extent, yes.

Q. Do you know what its composition is, what is in it? A. No, I don't know its formula.

Q. Now Mr. Cooper referred to fifty-gallon drums. As a matter of fact, these are what are commonly referred to as fifty-four gallon drums that it comes in, does it not?

A. Not necessarily. In the trade they are called fifty-gallon drums.

Q. Do you know how much the drums of Texacoat aboard the Iran Victory on this particular voyage held? A. Well, they were full.

Q. You don't know whether they were fifty gallons of fifty-four? A. No, I do not.

Q. Do you know how heavy that Texacoat is by the gallon? A. No.

Q. Do you know from your own—you have had experience in dealing with this particular product or similar products?

A. That's right, but I never weighed it.

Q. Can you compare it with water?

(Testimony of Walter E. Brunsch.)

A. It is a little heavier than water.

Q. Is it heavier than heavy fuel oil, do you know? A. No, not that heavy. [92]

Q. Do you know whether or not on the 28th day of April, 1949, the drums of Texacoat aboard the Iran Victory were full or if they had been partly used?

A. To the best of my knowledge they were full.

Q. Do you know where they were stored aboard the ship? A. Aft.

Q. On one of the decks?

A. On the main deck aft.

Q. You have testified under direct examination that you have never seen a pump used to remove material of this nature from a drum; is that correct?

A. Material of that nature, which is paint, no.

Q. Ordinarily in your experience in eighteen years at sea when you go about painting a portion of a vessel, how much do you extract from one of these large drums?

A. You usually use—get a paint pot—that is one of the five-gallon pots, put the material in that, and then each man takes it to the part of the ship that he is working on.

Q. What is the process ordinarily used to transfer the paint from the large fifty or fifty-five gallon drum to the five-gallon paint pot?

A. Open up the air bung and the bigger bung and tilt it over into your pot that is standing underneath.

Q. In tilting it over, starting out with a drum

(Testimony of Walter E. Brunsch.)

assuming it is full, it is rather heavy—you can't give us the exact weight? [93]

A. No, I can't give you the weight.

Q. Isn't there a lot of spilling involved in tipping a flat drum?      A. Not necessarily.

Q. Into a five-gallon pot?

A. Not necessarily, because you hold your five-gallon can up to where your material is coming out.

The Court: May I interrupt?

Mr. Pinney: Yes.

The Court: How tall is one of these drums?

A. It is a regular fifty-gallon drum that you get your oil in or any other type of—it is a regular commercial fifty-gallon steel drum.

Q. What is the circumference of it, approximately?

A. Oh, I would say it is about twenty-eight inches in diameter.

Q. How many men does it require in an operation of that kind?

A. Usually two men to handle the drum and one to handle the bucket.

Q. That is, two men to tilt the drum?

A. One gets on each side and they tilt the drum, and the other fellow puts the bucket so you don't lose your material.

Mr. Pinney: Are you through, your Honor?

The Court: Yes.

Q. (By Mr. Pinney): I don't believe you answered his Honor's question on the height of the



(Testimony of Walter E. Brunsch.)

drum. Was it somewhere in the [94] neighborhood of four feet?

A. He didn't ask me the height; he wanted to know the diameter.

Q. What is the height of it, approximately?

A. Well, I think approximately forty inches; that is just a guess.

Q. In the eighteen years you have been at sea, what type of ships have you sailed on? Have they all been steam? A. Yes.

Q. And have they all been cargo ships or have they been ships of different types like tankers and passenger ships?

A. They have been of various types.

Q. The Iran Victory was a cargo ship, wasn't it?

A. Yes.

Q. How many voyages have you made on a cargo ship? A. Well, that is hard to say.

Q. Have you made a great number?

A. Probably two or three hundred.

Q. Have you ever been aboard one of those ships as an a.b.? A. Yes.

Q. How long were you an a.b.?

A. About two years.

Q. Ever served as a boatswain?

A. Acting boatswain.

Q. How long did you serve as an acting boatswain? A. Six months. [95]

Q. My questions are restricted to your time as an a.b. on cargo ships. How long have you served as an a.b. over all on any type of ship?

(Testimony of Walter E. Brunsch.)

A. Approximately two years.

Q. That was the same situation when acting boatswain on all types of vessels?

A. That's right.

Q. In what capacity have you shipped out as other than as an a.b. and as an acting boatswain?

A. Right through the ranks as an officer.

Q. From there you either went to third mate or acting third mate?

A. I started as a cadet, and from there on I went on through.

Q. It is a fact, is it not, that it is the boatswain aboard ship who supervises the activities of the a.b.'s. in the work that they are conducting?

A. Under the direction of the mate.

Q. In your capacity as a mate you didn't observe what directions the boatswain gave to the men with respect to what was to be accomplished, did you?

A. Will you restate that question?

Q. Let me withdraw it and start it over again. You gave general instructions to the boatswain to accomplish this and this and this, is that correct.

A. That is right. [96]

Q. And then you left it up to the boatswain to choose the manner in which he delegated the work to the men, is that correct?

A. That is true.

Q. And you just looked to him for the finished result?

A. No, I can inspect the work as it progresses.

Q. You inspected the work while it was in progress and looked to the boatswain to produce the

(Testimony of Walter E. Brunsch.)

finished result at the end of the watch or whenever it should have been finished?

A. That is right.

Q. Have you have ever on any occasion on any ships that you sailed on as an officer inquired as to whether or not there were pumps aboard ship to transfer liquid from one container to another?

A. Yes, every ship has pumps.

Q. Every ship has pumps? A. Right.

Q. Were there pumps aboard the Iran Victory?

A. Yes.

Q. What kind of pumps were aboard the Iran Victory?

A. They have steam and regular pumps; they have lifeboat pumps. There are a number of different types of pumps.

Q. And there aboard the ship were pumps that are not used in connection with either the lifeboat or the actual running operation of the ship; by that I mean in connection with steam pumps or things of that nature, are there not? Well, let me [97] withdraw the question. Aside from the lifeboat pumps, were there on the Iran Victory any other small hand pumps of any kind? A. Yes.

Q. How many such small hand pumps were aboard the Iran Victory? A. One.

Q. And where was that customarily kept?

A. It belonged to the engineers.

Q. It belonged to the engineers. For what purpose did the engineers use it?

A. For transferring their diesel oil and coal oil.

(Testimony of Walter E. Brunsch.)

Q. How about the other ships on which you have served as an officer? Have there been small hand pumps kept aboard those ships other than lifeboat pumps? A. Yes, for the same purpose.

Q. It is a fact, is it not, that the deck department frequently, if they do not have a pump of their own, borrows a pump from the engine department? A. Not to pump paint.

Q. Let me ask you the question again. It is a fact, is it not, that the deck department, if they do not have a hand pump of their own, frequently borrows a hand pump from the engine department?

A. No.

Q. In your experience does the deck department ever borrow a hand pump from the engine department? [98] A. Yes.

Q. For what purpose would the deck department borrow such a pump?

A. To transfer coal oil up into the coal oil storage tank or your paint thinner.

Q. How do you get paint thinner aboard a ship? How does that come packed?

A. Well, it comes in different ways; you can get it in five-gallon cans, one-gallon cans, or fifty-gallon drums.

Q. Have you ever got in anything larger than fifty-gallon drums?

A. Not unless they have a tank for it and pump it there.

Q. You have been aboard ships where the pump



(Testimony of Walter E. Brunsch.)

was used to transfer paint thinner from drums, haven't you?      A. Paint thinner, yes.

Q. What else have you seen a pump used for to transfer a liquid from one container to another?

A. Kerosene and diesel oil.

Q. How do you get kerosene aboard a ship?

A. Fifty-gallon drums.

Q. Fifty-gallon drums?

A. As a usual thing.

Q. What was the other thing?

A. Diesel oil.

Q. How do you get the diesel oil aboard the ship? How does that [99] come? In fifty-gallon drums?

A. In some cases, if they don't want too much; other words, they pump it aboard to the tank direct.

Q. Have you ever seen a hand pump used to transfer diesel oil from fifty-gallon drums?

A. No.

Q. Anything else that you use a hand pump aboard the ship for to transfer liquids?

A. No, I can't think of anything at the moment.

Q. When you transfer paint thinner from fifty-gallon drums is there any reason why you need a hand pump? Why can't you just pour it?

A. Because we would put it into a tank that is above the deck level.

Q. Is that true on all ships that the tank in which you keep paint thinner is above the deck level?

A. No. You asked if I had ever seen it done.

(Testimony of Walter E. Brunsch.)

Q. Is that the only occasion in which you have ever seen a pump used to transfer paint thinner, when the container to which it was to be transferred was about the deck level?

A. No; I don't know——

Q. As a matter of fact, you use these hand pumps frequently to transfer liquid from fifty-gallon drums whether it is to be transferred to above the deck level or not?

A. Are you asking me or telling me? [100]

Q. I am asking you? A. No.

Q. As a matter of fact, that is common practice aboard American merchant ships to transfer liquids out of fifty-gallon drums, isn't that a fact?

A. Not to my knowledge.

Q. But you have seen it done on occasions when you were transferring a liquid from one container which was not above the deck level of the fifty-gallon drum? A. In certain cases, I have.

Mr. Pinney: I have no further questions.

### Redirect Examination

By Mr. Cooper:

Just one other question.

Q. Mr. Brunsch, what other steamship companies have you served other than P. F. E. on the Iran Victory?

A. Matson Lines, American Mail Line, Calmar Line.

Q. Calmar?

(Testimony of Walter E. Brunsch.)

A. Yes, and I just finished with the Pacific Factors.

Mr. Cooper: That is all.

Mr. Pinney: I have no further questions.

The Court: Mr. Brunsch may be excused. Next witness. [101]

\* \* \*

**DR. SAMUEL F. BOYLE**

called as a witness in behalf of the respondents, being first duly sworn, testified as follows:

The Clerk: Will you state your name for the record.

A. Samuel Frederick Boyle.

**Direct Examination**

By Mr. Cooper:

Q. Doctor Boyle, what is your profession?

A. I am a physician, eye specialist.

Q. Are you licensed to practice in the State of California? A. Yes, I am.

Q. Doctor, how long have you been a physician?

A. I have been a physician since 1917.

Q. 1917. Have you specialized in any particular field?

A. I have specialized in diseases of the eye for twenty years.

Q. What doctors are you associated with?

A. Doctor Otto Barkan and Doctor Furguson.

Q. How long has that association existed? [105]

A. For twenty years.

(Testimony of Dr. Samuel F. Boyle.)

Q. Doctor, did you have occasion to examine Mr. Sundwall, Edmund Sundwall, in December, I think it was, 1949?

A. Yes, I saw him on December the 20th.

Q. And he is the gentleman sitting behind Mr. Pinney, the attorney in this case? A. Yes.

Q. Doctor, what did you find at that time?

A. I found that he had lost the sight of the right eye some years before and he consulted—he was examined on account of a history of the left eye. I found that he had a heavy scar of the cornea of the left eye and his vision was reduced to 20/200.

Q. Doctor, from your examination of the eye at that time was it your opinion that an operation was indicated? A. No.

Q. Under your characterization, was that eye of considerable use or was it not at that time?

A. No, he had—he could read the largest letter of our chart, so that I assumed that he could do some rough work at that time.

Q. You say he could read the largest letter. Assume it is in evidence, which it is, that in November, 1948, the vision of the eye described was 20/80, what did the reduction in vision amount between that time and the time you examined the eye?

A. The difference between 20/200, the vision he had at the time [106] I examined him, and the vision of 20/80 is the difference of three lines in our chart.

Q. Doctor, was it your opinion if the eye had



(Testimony of Dr. Samuel F. Boyle.)

been left alone that it would have improved or would it likely get worse?

A. Well, it was healed when I saw him and I assumed that it would remain healed. It seemed firm, and if it remained healed it might improve just slightly.

Q. Doctor, when you saw him in December, 1949, was there only one cornea scar or was there more than one?

A. There was one large central scar in that cornea which covered the pupillary area.

Q. It is in evidence here that in November, 1949, there was a corneal scar at eleven o'clock. Did you notice that in the hospital records that you examined?

A. Yes, I did.

Q. At this time when you examined him in December, 1949, was there any dividing line between that corneal scar and the larger scar?

A. No, there was just one large scar, which I imagine encompassed the other one.

Q. Doctor, the history of this case is that while Mr. Sundwall was with two other seamen pouring oil out of a drum into a bucket, that some of this oil splashed up and got on his face and some of the drops got into his eye. The oil has been described as somewhat heavier than water. Will you tell us, whether in your [107] opinion and from your experience in other cases, the splashing up of a fluid of that kind into the eye would cause trauma which in turn would cause an ulcer and a scarring?

(Testimony of Dr. Samuel F. Boyle.)

A. It depends upon the character of the fluid that splashes into the eye.

Q. The question that I was really asking you first, Doctor, was whether the force of the blow would cause trauma?      A. No, I do not——

Mr. Pinney: Just a moment, Doctor, I think this is highly speculative; there is a lack of testimony in the record on which to propound such a question as to the force of the blow. He asked him whether the splashing of some fluid into the eye would have sufficient force to cause trauma. I think he should lay a more definite foundation for the Doctor's answer. If he can't I don't think he can properly put that question.

The Court: The objection will be overruled.

Mr. Cooper: Do you understand the question now, Doctor?

A. Yes. I wouldn't think that splashing of fluid from a few feet into an eye would cause any trauma, any serious damage at all.

Q. Will you tell us, Doctor, by comparison, if you think advisable, what the cornea on the eye is? What is the nature of it—I will put it this way—as to toughness as compared to some other tissue of the body?

A. The cornea is the outer transparent covering of the eye, [108] the glass of the eye, and it is really very tough. It is like the skin, even tougher, and it is hard to penetrate it. Although it is very sensitive, it is quite strong. It is as strong as the skin or stronger.

(Testimony of Dr. Samuel F. Boyle.)

Q. You said sensitive. Do you mean sensitive from a nerve standpoint?

A. Yes, sensitive to pain and injury.

Q. If it does have pain and injury, what is the physical effect on the patient?

A. Well, the patient has a sensation of pain, has tears and blinks the eye. It is the same sensation as a person getting a cinder in their eye, which is a well-known phenomenon.

Q. And ordinarily, Doctor, when you get a cinder in your eye, once the cinder is removed what is the effect of the it?

A. The patient is usually cured; ninety-nine times out of a hundred, I should say.

Q. That is, if he got such an object as a cinder—how many times out of the hundred do you say, Doctor?

A. Ninety-nine times out of a hundred.

Q. Assuming that you had a fluid that was mildly irritating and within a comparatively short time after the mishap that caused the fluid to get in the eye, the eye was washed with luke warm water, and within an hour or two after that the eye was again washed, either with the assistance of another person or by the man himself, with an eye cup, what would you anticipate [109] would be effect of removing any irritating cause?

A. Well, that would be considered good treatment, and unless the fluid were something like lye or very strong acid or scalding material of some kind, it should be sufficient to relieve the symptoms.

(Testimony of Dr. Samuel F. Boyle.)

Q. Doctor, what is the usual effect of tears in the eye following an irritation where the material is fluid and not a hard substance?

A. Tears—that is nature's method of cleansing the eye and washing away any foreign material or substance in the eye.

Q. Now, Doctor, if there was serious irritation, irritation enough to cause an ulcer, from your experience over twenty years as a specialist, would you expect or would you consider it likely that a man could continue to work, which involved standing lookout on the head of the vessel and also standing a watch described as a wheel watch which involved looking at a compass—a lighted compass. Would you expect or anticipate if this were more than mildly irritating substance that a man would be able to do that sort of work?

A. Well, if he had two eyes, he might be able to do it; but in this case the man had just one eye, and if there was any severe irritation he would be blinking, tearing and difficulty doing any work that required use of the eyes.

Q. Doctor, it is the history of this case and particularly to the left eye, that in 1933 there was some rust got in the eye [110] which caused some trouble, and that on a dozen times thereafter over a period of time not indicated in the record he had what is called recurrent irritation of the eye. Now I will ask you first, whether that in your experience would be caused by the rust?

A. No, I should think not.



(Testimony of Dr. Samuel F. Boyle.)

Q. What would be the cause, Doctor, of that recurrent irritation?

A. Well, any infection in the eye would cause recurrent irritation. That is the commonest cause which one sees in private practice—mild infections as a rule.

Q. It is also in evidence here that the patient here had what is described as acute iritis, I believe the record shows, in 1941 and '42 of the left eye. Will you tell us what that is and what it indicates in the way of a cause if there is no history of it being caused by trauma?

A. Iritis is an inflammation of the colored portion of the eye; and if the eye has not been injured, it is from some internal disorder or some internal intoxication—some poison in the blood that happens to go to the eye and causes inflammation in the iris.

Q. Doctor, it is in the history of this case also that there was a corneal scar at eleven o'clock, that was in 1948, and there is no history of trauma having caused that scar. What would be your conclusion as to the cause of it, Doctor? [111]

A. Scars of the cornea, apart from those that are caused by injury, are the result as a rule of ulceration—ulcer of the cornea, which heals and leaves a scar.

Q. And like the iris, is that due to infection, usually?

A. Yes, but not from internal infections, as a rule. Infection often starts in the lid, what is com-

(Testimony of Dr. Samuel F. Boyle.)

monly called a cold in the eye. and following that there may be an ulceration.

Q. Which is not due to trauma—I mean may not be; it is not due to trauma if there is no history?

A. Not as a rule, no; if there is no history it is due to other causes.

Q. Doctor, from the history of the case which has already been recited to you, will you tell us whether, in your opinion, the condition of the eye which caused further scarring was due to the same general cause that caused the condition in the iris and also the cornea on the previous occasions?

A. Well, viewing the scar, I can't tell the cause of it; but this man had a history of previous ulcerations; he also had the history of the fluid splashing into the eye. Now, if the fluid was damaging enough, due to its character, to produce ulceration, it could produce further scarring of the eye. Further scarring could also be caused by the same infections that had produced the previous attacks.

Mr. Cooper: I believe that is all. [112]

### Cross-Examination

By Mr. Pinney:

Q. Doctor, before coming here to testify this morning, you have looked at the records of the Marine Hospital and familiarized yourself with them, have you not?

A. I have looked over them.

Q. The records of the Marine Hospital show—

(Testimony of Dr. Samuel F. Boyle.)

I believe it is the 1946 entry shows that there is a corneal scar at eleven o'clock on the left eye?

A. Yes.

Q. You yourself——

Mr. Cooper: Wasn't that '48?

Mr. Pinney: I may be mistaken.

Mr. Cooper: '48, I think.

The Court: I think my notes reveal it was '48.

Q. (By Mr. Pinney): In any event, you are aware of the fact that one of the examinations shows a corneal scar at eleven o'clock; is that correct?

A. Yes.

Q. Will you find that in these records, Doctor?

A. I see a drawing.

Q. Doctor, I will give it to you; just stay on the stand.

A. Pardon me.

Q. That is all right, Doctor. That was the 1948 entry that showed the corneal scar, is that correct?

A. Yes, November 3rd; it says here 1948, and the drawing shows the right eye and also the left. The scar appears to be on the [113] left, according to this diagram.

Q. In that report of the Marine Hospital records that you are examining, is there any explanation which would account for the presence of that scar at eleven o'clock?

A. It says nothing here to that effect.

Q. So as far as those records are concerned, you can't form any opinion as to the cause of that scar?

A. (No response.)

Q. (Continuing): Will you turn back to the

(Testimony of Dr. Samuel F. Boyle.)

1946 slip, Doctor? Does the 1946 entry say anything with respect to the left eye?

A. It says that he states "struck in eyes with banana lift 1940, defective vision in both eyes since. In hospital Cuba Island twenty-eight days."

The Court: When was that, Doctor? What is the date of that?

A. That was February 26, 1946.

Q. (By Mr. Pinney): Is there anything in the record before you to indicate whether or not there was or there was not a scar on the cornea of the left eye at the time of that 1946 examination?

A. No; all it says about the left eye is that the vision was 20/70 and with a glass he was able to read 20/40 at that date.

Q. So you can't tell from those records whether that scar was there in '46 or whether it wasn't, is that correct?

A. No; it just says he has defective vision in both eyes on that [114] date.

Q. Is it possible, Doctor, that that scar which was observed in the November, 1948, examination might have been caused by this history of rust in his eye back in 1933? A. It might have been.

Q. That is the type of thing that you would expect might cause a corneal scar?

A. It is a very large scar, and usually rust in the eye produces a small scar unless there has been an ulceration and infection.

Q. You are not able to determine from the Marine Hospital records you have examined and the



(Testimony of Dr. Samuel F. Boyle.)

history you have taken from the patient what the reason for that scar is; it might have been from infection, it might have been from trauma; it might have been from any other cause that ordinarily results in scarring, is that correct?

A. Yes, except rust in the eye if it is removed leaves little scars. That is the ordinary injury we see in the office.

Q. What I am getting at is this, Doctor, you can't tell whether that arose from rust being in the eye, from the trauma or from some other undescribed trauma of some kind, or whether it is due to infection, is that right?

A. It must be an infection to leave a scar of any consequence.

Q. Doctor——

A. The infection may follow the rust, that is quite right. [115]

Q. The infection may be induced by the presence of rust or by trauma or something of that kind?

A. (No response.)

Q. At the time you examined him initially in December, 1949, you say that the vision in the left eye was 20/200?           A. Yes.

Q. That is what you found?           A. Yes.

Q. The records of the Marine Hospital which you have examined show that in June, 1949, some roughly six months before, he had vision of 20/300, I believe, in the left eye.

A. I don't remember the figures, but that is probably correct.

(Testimony of Dr. Samuel F. Boyle.)

Q. It is a fact, is it not, Doctor, that when the vision has reached that state where you find 20/200, the vision is considerably below normal, isn't it?

A. Yes, yes.

Q. And you making an examination might conclude his vision to be 20/200, and somebody else making an examination at the same time might find it as low as 20/300?

A. There isn't very much difference.

Q. It has reached the state where it can do little more than distinguish between light and dark, not a great deal; isn't that a fact, Doctor?

A. Oh, yes, they can do quite a bit more than that.

Q. Am I correct in my assumption that 20/200 means that at a [116] distance of twenty feet he can read letters on your chart or distinguish objects that you would expect a person with normal vision, 20/20 vision, to read at 200 feet?

A. That is right.

Q. At the time you made the examination in December of 1949 you found a scar on the center of the cornea, is that correct?

A. Yes.

Q. Did you find and were you able to tell from your examination whether or not that scar extended over to the position of eleven o'clock, which the Marine Hospital records show that there had previously been a scar?

A. No, I can't say. I made a little diagram, but it doesn't show that.

Q. At the time you made the examination you

(Testimony of Dr. Samuel F. Boyle.)

weren't aware of the fact that there was a previous history of a scar at eleven o'clock, were you, Doctor?       A. No.

Q. So you didn't have that fact in mind when you made your examination and you didn't examine it with a view of determining whether or not this extended into the eleven o'clock scar or whether this was the same scar?       A. No.

Q. Were you able, from your examination of December, 1949, to determine anything with respect to the age of the scar, how long it had been [117] there?

A. It was a well-healed, deep, firm scar, and from the appearance of it I assumed it had been there for some time.

Q. Could it have been a scar occasioned as early as April or May of 1949, the year in which you made your examination?

A. It might have been that old.

Q. It might have been that old?

A. Or older.

Q. It wouldn't be unreasonable to assume from your examination that it was caused by an injury in April of 1949?       A. No.

Q. Now I believe you said, Doctor—and correct me if I am mistaken—that scarring is caused by infection—corneal scarring?

A. It is the healing process after infection.

Q. It is the healing process after infection, and the infection may be induced either—I will with-

(Testimony of Dr. Samuel F. Boyle.)

draw that. Infection to the cornea must be induced by something external to the eyeball or the cornea itself; is that correct, Doctor?

A. Well, it may come from within the system, of course. A person may have an ulcer without any injury or without any external infection, coming from the lids or any place like that.

Q. Ordinarily, Doctor, infection of the cornea which results in scarring results from something being applied externally to the cornea either introduced to the eyelid or through the eye [118] itself?

A. As a rule.

Q. Or from some place outside?

A. We have tubercular scars and so on; they come from the outside.

Q. Could you tell from the nature of the scar whether it was a tubercular scar?

A. No, but they usually don't—

Q. It is reasonable to assume that this is not a tubercular scar?      A. Yes.

Q. What other internally induced scars other than tubercular scars are there of the cornea?

A. Well, there are ulcers of the ears in people. For instance, if they have a fever, they may get fever blisters on their lips and also on their eyes, and when the blister breaks, why, then you have an ulcer, an open wound, which produces scarring after it heals.

Q. Can you think of any other internally induced scars?

A. There is the dendritic cultures, which are not



(Testimony of Dr. Samuel F. Boyle.)

uncommon. They produce quite a bit of scarring if they do not heal readily.

Q. Can you think of any other, Doctor?

A. There are virus conditions.

Q. Can you think of any others?

A. In smallpox they may have a pock—pock-mark on the cornea, [119] and there are certain skin conditions, acne rosacea, which breaks out into the eye and produces scarring. There is herpes zoster, which is a breaking out of the face which sometimes involves the cornea and very frequently makes scars; and then there are a number of conditions in which the cause is not known in which people have various illnesses which are common to a group like serious flu, and the cornea breaks down and they have an ulcer and sometimes scarring; frequently not, though.

Q. Does that pretty well exhaust the internal causes?

A. Those are the ones that I think of that come into the office from time to time.

Q. Do you have any reason to suspect that the existence of any of those internal conditions which cause ulceration which you have just described for us were present in this case?

A. Well, we have many cases and all doctors do of people who come in with ulcers of the cornea in which the cause is never found. They are sent to their physicians for examinations and reports often come back that they are healthy, but they still have the ulcers.

(Testimony of Dr. Samuel F. Boyle.)

Q. Well, there would be some sort of an accompanying history to go with any of these internal induced ulcers that you have described, would there not? There would be a history of smallpox in the case of smallpox ulcers, or some high fever of some kind in connection with fever, or acne in connection with them, and so forth, wouldn't there, [120] Doctor? A. With that group, yes.

Q. Did you in your examination of Mr. Sundwall in this case take a history to determine whether or not the scarring you observed might have been due to any of these internal causes for ulceration and scarring? A. No.

Q. You didn't think that it was, did you, Doctor?

A. He gave me a history of getting this material in his eye and he told me before that his eye had been all right.

Q. You don't know what the nature of the material was that was in his eye, do you? You have Mr. Sundwall's description it was some kind of oil or something like that? A. Yes.

Q. That is all you have—is that the only history that you have of what the substance was that got into his eye?

A. Well, I phoned—at the time I knew that was an important point. I phoned around and found it was made by Texaco Company, and I communicated with some man down there, but he couldn't tell me in any kind of language that I could understand what was in it.

(Testimony of Dr. Samuel F. Boyle.)

Q. He couldn't tell you what was in it?

A. I was trying to find out whether it was alkaline or acid or whether there was some tar material in it that might burn the eye. It didn't seem to have any of those things, any that I had experience with that caused scarring of the eye. [121]

Q. Did Mr. Sundwall give you a history that the substance had irritated, had burned his eye?

A. He told me he was pouring it from one vessel to another and it splashed and went in his eye. I wrote down his words, he said while pouring out compound from a barrel to a bucket on shipboard some of the compound splashed into the left eye.

Q. Did you inquire of him whether or not there was any burning sensation or irritation in connection with this?

A. I probably did, yes. "Patient claims that it was painful; washed out by the purser." The purser washed out the eye. He was then on shipboard six days out of San Francisco. He reached Okinawa on May 10th and was sent to the hospital there.

Q. Doctor, without knowing what the substance was, what was in the substance, assuming that it was something that pained his eye, which is the description that he gave you, it would be reasonable to assume that the scarring you observed might have been caused by an irritation set up by that substance which burned his eye, wouldn't it, Doctor?

A. It might.

Q. And if you had no other external causes of

(Testimony of Dr. Samuel F. Boyle.)

any kind which result in it and no history of any of these things which you have outlined to me that might cause it internally, it would be, in your opinion, probable that it caused the scarring, would it not, Doctor?

A. Well, can I answer that a little [122] indirectly?

Q. Of course; I want you to answer it any way that enables you to portray the facts of the thing.

A. In the office we see many people with ulcers and scars of the cornea in the private practice, and more than half of them have ulcers or scars the cause of which we do not know or we cannot discover either. In industrial practice that we have always carried on to some extent and to a considerable extent in the past, many scars and ulcers of course are caused by foreign material in the eye.

Q. Have you completed your answer, Doctor?

A. Yes.

Q. Well, let me put it this way: Any ulceration of the eye which results in scarring is caused by something; is that correct? A. Correct.

Q. All you can do as a physician and eye specialist is take the possible causes and eliminate those which are improbable and arrive at some conclusion as to what causes the scarring; is that right?

A. Yes; if you have all the facts it is very helpful.

Q. And the scarring in this case could have been caused by an irritation of the eye induced by something splashing in it? A. Yes.



(Testimony of Dr. Samuel F. Boyle.)

Q. Doctor, you expressed the opinion that at the time you made the examination, December 20, 1949, you did not feel then an operation was necessary upon the left eye; is that correct? [123]

A. No.

Q. Will you describe as best you can the effect of this scarring upon his vision; that is the vision presumably is reduced to this figure as you put it 20/200 by the scarring. Why is it reduced?

A. The vision is reduced due to the obstruction in his line of vision, and the obstruction is due to the scar.

Q. And that obstruction in the line of vision results in this, doesn't it, Doctor: that the eye is a mechanism for transmitting light and the scarring upon the cornea interferes with the transmission of light to the eye system? That is simplifying it?

A. Yes; it is like trying to look out of a window when the shade is down.

Q. To use your phrase, if nothing was done about that corneal scar, would the shade ever go up?

A. No, not to any extent.

Q. Is it possible, Doctor, that without anything else happening, any other trauma or anything else in the eye, just in the normal process of the development of the eye in what might be set up by the scar itself, that the eyesight might diminish in that eye?

A. Yes.

Q. That is probable, Doctor, isn't it, that as time goes on and if nothing were done about that cornea, it would become more and more opaque?

(Testimony of Dr. Samuel F. Boyle.)

A. No, not unless there was irritation. It might be getting a [124] little better or a little worse. It was a heavy scar. I didn't expect much improvement.

Q. And you wouldn't expect it to get better?

A. No, he wouldn't get his sight back.

Q. To use your words, the only way he can improve with the shade down is to put the shade up?

A. Right.

Q. The only way you could do that would be to have that cornea removed and graft another piece over there, so the light can come in?

A. That is right.

Q. Whether that could be done in any particular case is a matter upon which medical men would differ?

A. Quite so.

Q. When you say you did not believe an operation was necessary in this case you told us in fact that this man was almost totally blind in the right eye, did you?

A. Yes, but he couldn't—with the vision that he had when he came to the office he couldn't get the blind pension. The State makes a difference between 20/200 and less than 20/200. He was just on the border line.

Q. Doctor, with the vision that you observed from examining him in December, 1949, would you say that he was capable of holding a ship on its course and watching a compass?

A. No. [125]

Q. I don't know how familiar you are with the

(Testimony of Dr. Samuel F. Boyle.)

sea, but do you think he would be capable of performing the ordinary duties of a seaman about a ship working lines and tackle?      A. No, no.

Q. What kind of work could he do with that vision?

A. He might work out on a farm some place, some job like that.

Q. What kind of work could he do on a farm, Doctor, from the standpoint of vision?

A. Well, I recall a case where a man went out to work on his son's farm. He did the plowing. He could follow the plow, and they had a pattern. He could see the lines of trees. He had no difficulty with 20/200. They don't get the blind pension, so it is generally conceded that they are able to earn some money some way.

Q. Assuming, Doctor, his vision as it was in 1949 was recorded by the Marine Hospital at 20/300, and assuming he had a vision of 20/300, do you still think he would be able to work on a farm?

A. No, I don't believe he would be very useful on a farm with that vision.

Q. The difference between 20/200 and 20/300?

A. The housewife does her duties with 20/300 around her own home.

Mr. Pinney: I won't ask you how good the dusting is.

I have no further questions. [126]

(Testimony of Dr. Samuel F. Boyle.)

Redirect Examination

By Mr. Cooper:

Q. I just want to ask one question. Doctor, assuming that this patient was in the Marine Hospital in the year 1941 and 1942 and that that record shows acute iritis, and that in 1946 he was also in the Marine Hospital, during which time there was an examination of the eye and eye history put down. Would you say there is any possibility that if there was a corneal scar at eleven o'clock as described in the record of 1948 that it would not be put down?

A. It should be put down.

Q. Well, would any ordinarily careful doctor put down that sort of a thing if he observed the eye?

Mr. Pinney: Your Honor, I am going to object to that. This is highly speculative. We are not trying the staff of the Marine Hospital for malpractice.

The Court: The objection is sustained.

Q. (By Mr. Cooper): Doctor, in a number of places and particularly when this patient first came to the Marine Hospital on June 24, 1948, they described the scar as "old leukoma." Now if this scar which they described, Doctor, was due to an injury, we will say happening the latter part of April of that same year, would it be likely that they would describe that as an old leukoma?

A. Leukoma means a deep, heavy scar, and I think that the average eye man when he says that



(Testimony of Dr. Samuel F. Boyle.)

it is an old scar it means it [127] dates back a year at least, perhaps many years.

Q. If the history of this case shows treatment; that is, in the nature of bandages and putting ointments or things of that general nature or drops in the eye, first at Okinawa about May 12th of that year and then later in the Honolulu hospital and then later in the Marine Hospital, would you say you would expect to find an old, deep scar at that stage of the condition? Do you understand the question?

A. Yes. By an old deep scar is meant that the scar dates back to some previous occasion and not related to the present condition, as a rule. That is the way we use the term in our office.

Q. I take it, when you said "yes" then, Doctor, in view of the rest of your answer you meant "no"; that is, it would not be described as an old deep scar if it were caused by this particular instance?

A. No; that is right.

Mr. Cooper: That is all.

#### Recross-Examination

By Mr. Pinney:

Q. Doctor, may I ask you a few questions with respect to the last thing counsel asked you about? Do you still have that little card from the Marine Hospital with you? A. Yes, I have.

Q. Referring to the entry of November, 1948, I believe that entry shows, if my recollection is correct, 20/80 vision in the [128] left eye?

(Testimony of Dr. Samuel F. Boyle.)

A. I don't see it here on the '48 page, but on '46.

Q. On the '46 page you get——

A. 20/80 without correction and 20/40 with correction.

Mr. Pinney: May I see that, Doctor? I understood the doctor testified yesterday he found that in '48.

Mr. Cooper: I believe that is in the record.

The Witness: It might be on the next page.

Q. (By Mr. Pinney): I direct your attention to the back of this November, '48, entry.

A. Oh, yes; I didn't turn the page.

Q. There are two entries there, Doctor; there is one in light blue ink and there is one in dark ink. I can't tell from my examination of that whether that entry in light blue ink which gives visibility in the left eye at 20/80 is from the November, '48, examination or from the March, 1949, examination. Can you tell from your knowledge of the manner in which records are kept to which that entry in light blue ink relates?

A. The stamp date is November 3, 1948.

Q. So you would assume that it was November of 1948 that that 20/80 relates to; is that correct?

A. Yes.

Q. Reading, Doctor, that March, 1949, entry in the darker ink, is there anything in that which reflects upon the extent of visibility out of the left eye? [129]

A. Would you repeat the question for me? I was looking——

(Testimony of Dr. Samuel F. Boyle.)

Q. Yes. Is there anything in that March, '49, entry, that is the one in the darker ink, which relates to the extent of visibility out of the left eye?

Mr. Cooper: March 11, '49, was it, Counsel?

The Witness: Yes.

Mr. Pinney: I don't know the precise date.

Mr. Cooper: I think he has it there.

A. March 11, '49. It says nothing about vision.

Q. (By Mr. Pinney): Nothing about the left?

A. Nothing about the vision, left.

Q. What does it say about the left eye?

A. "Left eye, scarring of cornea, deep—with some synechia"—which means adhesions—"and pigment therein. Small area of cataract formation in left lens. No further treatment at this time."

Q. Doctor, I believe that when I asked you about this condition that you observed at the time of your December, '49, examination as to whether or not you would expect his vision to get worse in the left eye, you said it should remain more or less static, there might be some fluctuation; is that right?

A. Yes; it was healed then.

Q. Doctor, if the man had at the time of the November, 1948, examination at the Marine Hospital that scarring which you found at the time of your December, 1949, examination, his vision [130] would have been considerably less than 20/80, wouldn't it?

A. I didn't quite understand that.

Q. Is it possible that in November, 1948, when the Marine Hospital found 20/80 vision of this left

(Testimony of Dr. Samuel F. Boyle.)

eye that the man could have had the scarring that you found in your December, 1949, examination?

A. Yes.

Q. You think that is possible?

A. In '48? It says he has a scar.

Q. I know it says he has a scar. It says he has 20/80 vision, too, Doctor.

A. Yes. Well, I assume that the reduction of vision is due to the scar at that time.

Q. At the time you examined him you found a vision of 20/200? A. Yes.

Q. Is it reasonable to assume that with the same scar that you saw when the vision was 20/200, which the Marine Hospital in June, 1949, found 20/300, that in November, 1948, there would be vision out of the same eye——

A. No, something must have been different.

Q. There must have been some change of the scar? A. Yes.

Q. As of March, 1949, when this man was last examined and before this incident relating to the trial. There is no indication of what his vision was in the left, according to those [131] records?

A. Before '49?

Q. No, March, 1949—I think you examined the records. A. Yes.

Q. It doesn't say what his vision is out of his left eye? A. No.

Q. Do you think it is reasonable to suppose, Doctor, since there is no entry about it, that it would be substantially the same as what preceded



(Testimony of Dr. Samuel F. Boyle.)

in November, 1948, substantially 20/80 or thereabouts?

Mr. Cooper: I think that is the same question that was objected to on cross-examination.

The Court: Well, I will have to sustain the objection.

Mr. Pinney: Very well.

Q. Are you satisfied, Doctor, from your examination of this man and from your general medical knowledge as an expert in this field, that there must have been some scarring since November of 1948 to produce the diminution of vision which you saw in December of '49? A. Yes.

Q. Something happened?

A. Something happened.

Q. In that year to cause more scarring?

A. Yes.

Q. Is that correct, doctor? [132]

A. That is right.

Mr. Pinney: I have no further questions.

### Further Redirect Examination

By Mr. Cooper:

Q. I just want to ask you one other question, in regard to the scar condition that existed in December, 1949, which you found, Doctor, and you told us in reference to that condition that it could get better or get worse. A. Yes.

Q. That is correct. Is or is not the same true of the scar condition which existed which is de-

(Testimony of Dr. Samuel F. Boyle.)

scribed as a deep scar in that cornea on March 11, 1949; could that not also get worse?      A. Yes.

Mr. Cooper: That is all.

### Further Recross-Examination

By Mr. Pinney:

Q. Doctor, maybe I misunderstood your testimony when I examined you. Didn't I understand you to say that as of December of 1949 when you found this 20/200 vision, that that would be more or less static; that it might get a little better or a little worse; it would be substantially the same?

A. Yes. Deep scars are not likely to change a great deal in either direction. You have these things happen, and you have to live with the expectation that they do not get much better or do not get much worse.

Q. The scar that you found in December of 1949 was a deep scar? [133]      A. Yes.

Q. And from that time on you wouldn't expect any great worsening in the eye state?      A. No.

Mr. Pinney: That is all.

Mr. Cooper: Thank you, Doctor.

The Court: You may be excused, Doctor.

Mr. Pinney: I will stipulate, your Honor, that counsel may read any portion of the deposition he desires into evidence if he will just give me the references as he reads them.

Mr. Cooper: Page 4 commencing with line 9 of his deposition given on January 28th, 1950. This

(Testimony of Dr. Samuel F. Boyle.)

refers to what was done after the mishap, your Honor.

“Q. You know you didn’t go immediately; you know that?”

“A. Yes, I know that, because I washed my eye and I never thought anything of it that day.”

That is all.

The Court: Do you have anything further, Mr. Pinney?

Mr. Pinney: No, I have no rebuttal, your Honor. Is that your case, Counsel?

Mr. Cooper: Yes. [134]

#### Certificate of Reporter

I, Official Reporter and Official Reporter pro tem, certify that the foregoing transcript of 134 pages is a true and correct transcript of the matter therein contained as reported by me (us) and thereafter reduced to typewriting. to the best of my (our) ability.

/s/ W. A. FOSTER.

---

[Title of District Court and Cause.]

#### CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of Cali-

fornia, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this court in the above-entitled case and that they constitute the record on appeal as designated by the parties:

Libel.

Answer.

Findings of Fact and Conclusions of Law.

Decree.

Notice of Appeal.

Petition for Appeal.

Order Allowing Appeal.

Assignment of Errors.

Citation on Appeal.

Cost Bond on Appeal.

Designation of Record.

Order Extending Time to Docket Apostles on Appeal.

1 Vol. of Reporter's Transcript.

Respondents' Exhibits: B, C, D, E, F, G, I, and J.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court this 17th day of August, 1951.

[Seal]

C. W. CALBREATH,  
Clerk.

By /s/ E. H. NORMAN,  
Deputy Clerk.



[Endorsed]: No. 13061. United States Court of Appeals for the Ninth Circuit. Edmund E. Sundwall, Appellant, vs. Pacific Far East Line, Inc., a Corporation, Sued Herein as Pacific Far East Steamship Company, Appellee. Apostles on Appeal. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed August 17, 1951.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 13061

EDMUND E. SUNDWALL,

Libelant-Appellant,

vs.

PACIFIC FAR EAST STEAMSHIP COM-  
PANY, FIRST DOE AND SECOND DOE,  
Respondent-Appellee.

STATEMENT OF POINTS UPON WHICH  
APPELLANT INTENDS TO RELY PUR-  
SUANT TO RULE 19(6)

To the Honorable Justices of the Court of Appeals  
for the Ninth Circuit at San Francisco, Cali-  
fornia:

Comes Now Appellant in the above-entitled mat-  
ter and respectfully urges and asserts the following  
errors in the findings of fact, conclusions of law,  
decree and judgment of the Honorable Edward P.  
Murphy, District Judge, which are herewith recited  
as a statement of points upon which the appellant  
intends to rely:

I.

The Honorable District Court erred in disregard-  
ing the testimony of libelant as to what equipment  
is customary aboard a ship to make it seaworthy.

II.

The Honorable District Court erred in disregard-

ing the testimony of libelant that the boatswain was negligent in ordering work done in the manner in which it was done, that the work was negligently done, and in failing to provide the necessary equipment.

III.

The Honorable District Court erred in dismissing libelant's libel herein.

Respectfully submitted,

BELLI, ASHE & PINNEY,  
Proctors for Libelant-  
Appellant.

By /s/ VAN H. PINNEY.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 13, 1951.

---

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD MATERIAL TO  
THE CONSIDERATION OF APPEAL  
PURSUANT TO RULE 19(6)

To the Honorable Justices of the United States  
Court of Appeals for the Ninth Circuit at San  
Francisco, California:

Comes Now Edmund E. Sundwall, appellant in  
the above-entitled matter, and designates the follow-  
ing documents, papers, pleadings, decrees, judg-  
ments and transcripts to be included in the record  
on appeal:

## 1. Transcript of Testimony.

(a) The testimony of Edmund E. Sundwall, witness called on behalf of libelant-appellant.

(b) Testimony of Dr. Constantine Bricca, witness called on behalf of libelant-appellant.

(c) Testimony of Walter Brunsch, witness called on behalf of respondent-appellee.

(d) Testimony of Dr. Samuel F. Boyle, witness called on behalf of respondent-appellee.

All of the foregoing testimony being reflected in the Reporter's Transcript on Appeal.

## 2. Pleadings, Documents and Decrees, etc.

(a) Libel in Personam filed in behalf of libelant November 17, 1949.

(b) Answer of the Respondent, Pacific Far East Steamship Company, filed January 23, 1950.

(c) Findings of Fact and Conclusions of Law entered in said cause, filed April 9, 1951.

(d) Final Decree entered in said cause, filed April 10, 1951.

(e) Petition for an Order Allowing Appeal, filed July 6, 1951.

(f) Order Allowing Appeal, filed July 6, 1951.

(h) Citation, issued July 6, 1951.

(i) Cost Bond on Appeal, filed July 13, 1951.

(j) Praeceptum for Apostles on Appeal.

(k) Designation of Record on Appeal, filed July 6, 1951.

Respectfully submitted,

BELLI, ASHE & PINNEY,



By /s/ VAN H. PINNEY,  
Proctors for Libelant-  
Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 13, 1951.

---

[Title of Court of Appeals and Cause.]

STIPULATION AND ORDER

It Is Hereby Stipulated by and between the attorneys for the respective parties hereto that all exhibits in the above-entitled matter, being Respondent's Exhibits A, B, C, D, E, F, G, H, I and J, and Respondent's Exhibit No. 3, may be considered by the above-entitled court in their original state, and need not be reprinted for the record on appeal.

/s/ VAN PINNEY,  
Proctor of Appellant.

DORR, COOPER & HAYS,  
Proctors for Appellee.

So Ordered Sept. 16, 1951.

/s/ CLIFTON MATHEWS,  
/s/ HOMER T. BONE,  
/s/ WILLIAM E. ORR,  
Judges, U. S. Court of  
Appeals.

[Endorsed]: Filed September 27, 1951.



No. 13,061

IN THE

United States Court of Appeals  
For the Ninth Circuit

---

EDMUND E. SUNDWALL,

*Libelant-Appellant,*

VS.

PACIFIC FAR EAST LINE, INC. (a corporation), Sued Herein as Pacific Far East Steamship Company,

*Respondent-Appellee.*

On Appeal from the United States District Court for the  
Northern District of California, Southern Division.

BRIEF FOR APPELLANT.

---

BELLI, ASHE & PINNEY,

240 Stockton Street, San Francisco 8, California,

*Proctors for Libelant-Appellant.*

FILED

NOV 26 1951

PAUL P. O'BRIEN  
CLERK





## Subject Index

---

	Page
I. Jurisdictional statement .....	1
Questions .....	2
II. Statement of the case .....	3
III. Specifications of error .....	7
IV. Argument .....	8
V. Conclusion .....	10

---

## Table of Authorities Cited

---

Cases	Page
Armit v. Loveland, 115 Fed. (2d) 308 .....	9
Carlisle Packing Co. v. Sandanger, 259 U.S. 259 .....	8
Grimberg v. Admiral Oriental S.S. Line, 300 Fed. 619.....	10
Mahnich v. Southern Steamship Co., 321 U.S. 96 .....	8
Socony-Vacuum Oil Co. v. Smith, 305 U.S. 428.....	8
The Osceola, 189 U.S. 158 .....	8

### Statutes

Merchant Marine Act of June 5, 1920 (Jones Act), 46 U.S.C. 688 .....	2
28 U.S.C. 1291 .....	2

### Constitutions

United States Constitution, Article III, Sections 1 and 2..	2
---	---



No. 13,061

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

---

EDMUND E. SUNDWALL,

*Libelant-Appellant,*

VS.

PACIFIC FAR EAST LINE, INC. (a corporation), Sued Herein as Pacific Far East Steamship Company,

*Respondent-Appellee.*

**On Appeal from the United States District Court for the  
Northern District of California, Southern Division.**

**BRIEF FOR APPELLANT.**

---

**I. JURISDICTIONAL STATEMENT.**

This is an appeal in Admiralty from a final decree of dismissal in favor of appellee, Pacific Far East Line, Inc., in the United States District Court for the Northern District of California, Southern Division, in an action for personal injuries sustained by a seaman aboard the Iran Victory.

The pleadings in the District Court were a Libel in Personam (Apostles on Appeal 3), and answer of

Pacific Far East Line, Inc. (A. 7). The Court made its order dismissing the libel on April 9, 1951.

The jurisdiction of the United States District Court over actions, civil and maritime, involving claims for damages arises from Article III, Sections 1 and 2, of the United States Constitution, wherein it is provided that the judicial power of the United States shall be vested in the Supreme Court and such inferior Courts as Congress may establish, and such power shall extend to all civil causes of Admiralty and maritime jurisdiction. Jurisdiction of the particular cause is authorized by the Merchant Marine Act of June 5, 1920 (Jones Act), 46 U.S.C. 688.

The jurisdiction of this Court is founded upon 28 U.S.C. 1291, by reason of a notice of appeal filed July 6, 1951, from a decree in favor of appellee herein on April 9, 1951.

#### **Questions.**

Appellant, a seaman aboard appellee's vessel, Iran Victory, sustained injury to his eye when oil being transferred from a large drum to a pail by appellant and by other seaman splashed in his eye. The evidence in the case was that it was customary to transfer oil from a drum to a smaller container by the use of a hand pump; that in this instance a hand pump had been requested by appellant but was not forthcoming and upon orders of his superior, he proceeded, in company with his two fellow seamen, to transfer the oil by pouring. The questions presented for appeal then are:

1. Was the ship rendered unseaworthy by the failure to provide a pump to transfer the oil?

2. Was appellee negligent in ordering the work done in the manner in which it was done?

---

## II. STATEMENT OF THE CASE.

Appellant is a seaman, who was 57 years of age at the time of the trial. He had been going to sea continuously since 1911 (A. 30). He went aboard the Iran Victory, a vessel owned by appellee, on April 8, 1949. At that time he presumed he took and passed the customary physical examination (A. 32). He could see out of his left eye in a satisfactory manner at that time (A. 33). On April 28, 1949, he got oil splashed in his eye aboard the Iran Victory. At that time, a seaman named Bowles and another seaman, whose name appellant does not recall, were working with him (A. 34). They were directed by the boatswain to transfer oil from a 54-gallon drum to a 5-gallon bucket (A. 35). The drum was full (A. 39). Appellant testified (A. 36-38):

“A. No; we got the order to release the lashing so I looked—like that we should have a pump; we don’t need to take the lashing off the barrel, the barrel can be lashed all the time, just use the pump. They don’t had no pump, so we took the lashing off and I held onto the bucket.

Q. Did you ask anybody for a pump?

A. Yes, sir.

Q. Who did you ask for a pump?



A. I asked the boatswain for a pump and he made the statement they don't have no pump on the ship.

Q. You have been going to sea ever since 1911, have you?

A. Yes, sir.

Q. Do you know what the custom is relating to removing oil from a fifty-four-gallon barrel on board ship?

A. The way I always done it and always seed it done, either to have a pump or else with a barrel high enough where you can get a bucket underneath and have a spigot.

Q. I believe you said you asked somebody for a pump?

A. Yes, sir.

Q. And you were told that there wasn't any pump, is that correct?

A. That is correct, sir.

Q. After the boatswain told you that there wasn't any pump did he tell you how to go about getting the oil out of the barrel?

A. That was the only way, I suppose, to take the top and the air top out there and the cap off and release the lashing and then pour out that way.

Q. Was there any spigot provided for you to use in getting the oil out of the barrel?

A. No, sir, they just told us to go ahead the way it was, release the lashing on the barrel and pour it in a bucket that way.

Q. Somebody told you to do it that way?

A. The boatswain told us to take the lashing off and get the five gallons of paint or oil out of there.

Q. Have you ever worked upon any ship where they didn't provide you with either a pump or a spigot?

A. No, sir.

Q. To take oil out of a barrel?

A. No, sir.

Q. Never in the years you have been to sea?

A. No, sir.

Q. How did you get the oil out of the barrel on this occasion?

A. Well, we took the cap off; the two fellows knocked the cap off or turned it so it could turn around, and pulled the barrel over, and I held the bucket.

Q. Who pulled the barrel over?

A. Them other two men, Bowles and——

Q. What did you do?

A. I held the bucket, sir.

Q. With you holding the bucket and the other two men pulling on the barrel will you tell us what happened?

A. Well, when we had about three—maybe three and a half feet of oil in that bucket, then all of a sudden, if they released the air hold or if the ship rolled, I can't tell you anything, that that oil splashed up and came in my face.

Q. You don't know what happened that made the oil come in your face, is that correct?

A. No, because I were watching the bucket so I don't get anything on the deck.

Q. How much oil came up in your face, do you know?

A. Oh, quite a lot.

Q. Did it cover your face?

A. Well, pretty well, good on one side, the way I was standing, the left side against the barrel.

Q. Did any of the oil get in your eye?

A. Positively.

Q. What eye?

A. My left eye."

After washing his face, appellant noticed that his eye started to burn and washed it out with an eye cup (A. 39).

Walter E. Brunsch, called as a witness for appellee, and who was the mate aboard the Iran Victory at the time of the injury, testified that one small hand pump belonging to the engineers, was kept aboard the Iran Victory; that it was used for transferring diesel oil and coal oil (A. 113); that in his experience the deck department sometimes borrowed the hand pump from the engineers (A. 114); that the deck department would use it to transfer coal oil or paint thinner; that paint thinner and kerosene comes aboard ship in fifty gallon drums (A. 114, 115).

Dr. Constantine R. Bricca, Jr., called as a witness for appellant, testified that he found a scarred area on the cornea of the left eye (A. 69); that in addition, there was corneal vascularity which resulted in the cornea becoming opaque (A. 70); that while 20/20 would be normal vision, Sundwall's vision was approximately 1/200 (A. 71); that the reason for this diminution in vision was the opaqueness of the cornea (A. 72); that the opacity and the scar was caused by a chemical burning (A. 78, 79).

Dr. Samuel F. Boyle, called as a witness for appellee, testified that when he examined Sundwall in December, 1949, he had vision in the left eye of 20/200 (A. 127); that it would not be unreasonable to assume that the scar on the cornea, which he observed, was caused by the injury of April, 1949 (A. 129); that the scarring he found could have been caused by an irritation of the eye induced by something splashing in it (A. 134); that Sundwall would be incapable of performing the ordinary duties of a seaman (A. 137); that while there was a history of eye injury prior to November, 1948, there must have been some scarring since that date to produce the diminution of vision which the doctor found in 1949 (A. 143).

---

### III. SPECIFICATIONS OF ERROR.

A. The Honorable District Court erred in disregarding the testimony of libelant as to what equipment is customary aboard a ship to make it seaworthy (A. 148).

B. The Honorable District Court erred in disregarding the testimony of libelant that the boatswain was negligent in ordering work done in the manner in which it was done, that the work was negligently done, and in failing to provide the necessary equipment (A. 148, 149).

C. The Honorable District Court erred in dismissing libelant's libel herein (A. 149).



## IV. ARGUMENT.

The law is well settled that the owner of a vessel is liable for his failure to furnish adequate appliances. *The Osceola*, 189 U.S. 158; *Carlisle Packing Co. v. Sandanger*, 259 U.S. 259; *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 428.

Where the method provided for doing work aboard ship is not adequate, the vessel is thereby rendered unseaworthy. As the Court said in *Mahnich v. Southern Steamship Co.*, 321 U.S. 96, 103:

“The staging from which petitioner fell was an appliance appurtenant to the ship. *It was unseaworthy in the sense that it was inadequate for the purpose for which it was ordinarily used \* \* \* its inadequacy rendered it unseaworthy \* \* \** (Emphasis added.)

“Nor does the fact that there was a sound rope on board, which might have been used to rig a safe staging, afford an excuse to the owner for the failure to provide a safe one. We have often had occasion to emphasize the conditions of the seaman’s employment, see *Socony-Vacuum Oil Co. v. Smith*, supra (305 U.S. 430, 431, 83 L. Ed. 269, 270, 59 S. Ct. 262) and cases cited which have been deemed to make him a ward of the admiralty and to place large responsibility for his safety on the owner. He is subject to the rigorous discipline of the sea, and all the conditions of his service constrain him to accept, without critical examination and without protest, working conditions and appliances as commanded by his superior officers. These conditions, which have generated the exacting requirement that the vessel or the owner must



provide the seaman with seaworthy appliances with which to do his work, likewise require that safe appliances be furnished when and where the work is to be done. For, as was said in the *Osceola*, supra (189 U.S. 175, 47 L. Ed. 764, 23 S. Ct. 483), the owner's obligation is 'to supply and *keep in order* the proper appliances appurtenant to the ship.' (Italics supplied.)"

It is obviously dangerous to pour oil from a full fifty gallon drum into a five gallon bucket. The motion of the ship, the weight of the drum, the human element make it highly probable that splashing will result. This danger was apparent to appellant. He asked for a hand pump, one which was available, according to the testimony of the mate and which had been borrowed in the past for transferring liquids. The use of the hand pump was the customary mode of doing the work in question. He was denied the use of the pump. The injury resulted. The situation is analogous to that in *Armit v. Loveland*, 115 Fed. (2d) 308. There, the injured seaman, noticing an absence of splash plates about the engine, asked the superintendent in charge of the upkeep of the boats for splash plates or materials which he could use to make them. This he was denied. A large amount of oil had splashed about the engine room and in going about his duties, the seaman slipped upon the oil and sustained injuries. The use of splash plates would have prevented the splashing of the oil. The Court said, at page 311:

“The plaintiff’s request for needed splash plates or material with which to make them was arbitrarily denied. As a direct consequence, the plaintiff, a seaman, had no alternative in the discharge of his duty but to put to sea without the splash plates on the engine or the correction otherwise of the condition which their absence necessarily and obviously produced. He was bound to use the equipment and appliances which his employers furnished. *Storgard v. France and Canada S.S. Corp.*, *supra*.”

The fact that appellant knew the danger of the course he pursued, does not defeat his right of recovery. As the Court said in *Grimberg v. Admiral Oriental S.S. Line*, 300 Fed. 619, 621:

“The seaman does not assume the risk of injury resulting from the unseaworthiness of the vessel, defective appliances, or a place to work not made reasonably safe, although with knowledge of the danger he continues in the employment. *Cricket S.S. Co. v. Parry* (C.C.A.) 263 Fed. 523, at 525 and 526, certiorari denied *Cricket Steamship Co. v. Parry*, 252 U.S. 580, 40 Sup. Ct. 345, 64 L. Ed. 726.”

---

## V. CONCLUSION.

Clearly, the injuries sustained by Sundwall resulted from the oil splashing in his eye. The oil splashed in his eye because of the method by which the boatswain directed the work to be done. The failure to supply a hand pump upon request rendered the work unsafe and the vessel thereby unseaworthy.

For the foregoing reasons, it is respectfully submitted that a reversal should be had in this case.

Dated, San Francisco, California,  
November 26, 1951.

BELLI, ASHE & PINNEY,

*Proctors for Libelant-Appellant.*



No. 13,061

IN THE

United States  
Court of Appeals

For the Ninth Circuit

---

EDMUND E. SUNDWALL,  
*Libelant-Appellant,*

VS.

PACIFIC FAR EAST LINE, INC. (a corporation), Sued herein as Pacific Far East Steamship Company,  
*Respondent-Appellee.*

---

BRIEF FOR RESPONDENT-APPELLEE

On Appeal from the United States District Court for the  
Northern District of California, Southern Division.

---

DORR, COOPER & HAYS

1505 Merchants Exchange Building  
San Francisco 4, California

*Proctors for Respondent-Appellee.*





## SUBJECT INDEX

---

	Page
Statement .....	1
Argument .....	3
It Was Not Negligence on the Part of Appellee's Boatswain to Direct Sundwall and Two Other Seamen to Remove Oil from a Fifty-Gallon Drum and Place It in a Five-Gallon Paint Bucket Without First Providing These Seamen with a Hand Pump; Neither Did the Absence of a Hand Pump Render the Vessel Unseaworthy.....	3

## TABLE OF CASES

---

	Pages
Adams v. Bortz, 279 Fed. 521.....	5
Armit v. Loveland, 115 F.(2d) 308.....	11
Baymead, The, 88 F.(2d) 144.....	3, 4, 5, 8
Biles v. United States, 1949 A.M.C. 875.....	5, 8
Drain v. Shipowners and Merchants Tug Boat Co., 149 F.(2d) 845 .....	10
Hanrahan v. Pacific Transport Co., 262 Fed. 951.....	5
Lillig v. Union Sulphur Co., 87 F.(2d) 277.....	9
Mahnich v. Southern Steamship Co., 321 U.S. 96.....	10
Santa Clara, The, 206 Fed. 179.....	5
Tonawanda Iron & Steel Co., In Re, 234 Fed. 198.....	5



No. 13,061

IN THE

United States  
Court of Appeals

For the Ninth Circuit

---

---

EDMUND E. SUNDWALL,

*Libelant-Appellant,*

VS.

PACIFIC FAR EAST LINE, INC. (a corporation), Sued herein as Pacific Far East Steamship Company,

*Respondent-Appellee.*

---

**BRIEF FOR RESPONDENT-APPELLEE**

On Appeal from the United States District Court for the  
Northern District of California, Southern Division.

---

**STATEMENT**

On the 28th day of April, 1949, Edmund Sundwall, a 57 year old seaman, was directed by the boatswain to remove material, described as oil, from a drum which was stowed on the after deck and to use the material to paint certain iron parts of the vessel. Sundwall proceeded, with two other seamen, to unlash the drum and to pour the oil from it

into a five-gallon paint bucket. The two bungs on the top of the drum were first opened up so that the oil would run out the lower bung and air would enter through the upper. Sundwall held the bail of the paint bucket with his left hand and placed his right hand under the bottom. When the bucket had filled up to a depth of about three feet (Sundwall, Ap. p. 37) some of the oil splashed on Sundwall's face and a few drops got into his left eye (Sundwall, Ap. p. 38).

After the accident Sundwall took the bucket to the location on the vessel where he was to do the painting and then went below and washed out his eye with some warm water. Later on—the exact interval of time does not appear except that meantime he had completed his watch and was taking a shower—he again washed out the eye. A few days later—the report of personal injury made out by the purser indicates that it was six days later—he went to the purser for treatment of his eye and was given some kind of an eye wash to use. Meantime he had stood his regular watches which included standing lookout forward on the vessel and the wheel watch on the bridge which involved looking at the vessel's compass. When he went to the purser it seems that the eye had commenced to cloud up. He was sent ashore at the first port of call for examination and later was returned to the United States Marine Hospital at San Francisco by airplane.

It is alleged in the libel that appellee “so negligently and carelessly maintained, managed and controlled said vessel as to cause oil, which libellant was then and there engaged in transferring from a drum to a five-gallon can, to splash upon and enter libellant's left eye \* \* \*.”



In a second cause of action it is alleged that the vessel was unseaworthy because of failure to provide pumps for the transfer of oil from an oil drum to a five-gallon can.

As the foregoing indicates, the operation during the course of which Sundwall got a few drops of oil in his left eye was a very simple one, and the question presented is whether it was negligence on the part of appellee to direct appellant to do such a simple operation without providing him with a pump for his use in doing so. The question of whether or not there was negligence or whether the vessel was unseaworthy in this case would appear to be the same.

### ARGUMENT

**It Was Not Negligence on the Part of Appellee's Boatswain to Direct Sundwall and Two Other Seamen to Remove Oil from a Fifty-Gallon Drum and Place It in a Five-Gallon Paint Bucket Without First Providing These Seamen with a Hand Pump; Neither Did the Absence of a Hand Pump Render the Vessel Unseaworthy.**

It is firmly established that a ship operator is not required to use the best and safest appliances and the failure to provide them is not negligence and does not render the vessel unseaworthy. This court has so held in *The Baymead*, 88 F.(2d) 144, saying:

“The shipowner is not obliged to furnish the best possible accommodations or equipment for his crew.”

As stated above, the job being performed by Sundwall and his fellow seamen was a very simple one. In general it is the kind of a job which any person in almost any walk of life, such as a farmer, garageman or painter, etc., would do and would do in the same way that the men on the vessel were doing it. It merely involved pouring a liquid out of a

larger container into a smaller one, and tipping the larger over to accomplish that.

The drum was of the kind commonly used for gasoline, oil, and other similar material. It was made of iron, was about forty inches high and twenty-eight inches in diameter, and was commonly called a fifty-gallon drum (Brunsch, Ap. pp. 110, 111). The bucket was of a kind commonly used for the purpose for which it was being used, i.e., to carry material by hand such as oil, paint, etc., about the ship.

As might well be anticipated this is not the kind of case which presents an issue which would be frequently litigated. However, a case basically the same was decided by this court in favor of the ship in the case of *The Baymead*, cited above. It was there contended by the libellant that the vessel was unseaworthy because steps, which the seaman was required to use, were too steep, worn and provided with only a single hand rail. This court affirmed the ruling of the trial court that the vessel was not unseaworthy. The court was of the view that if there was hazard in connection with the use of the stairway, that the libellant should have used a different method of descending the steps (gone down backwards instead of forwards). The court there said:

“With reference to the ladder being too nearly vertical so that the steps provided an insecure foothold to the seamen going down the ladder facing away from the steps, it is sufficient to say that the position of the ladder was well known to the appellant who used it daily and that if in his judgment there was insufficient foothold provided by the steps while facing forward, there is no good reason he should not have turned about and faced the ladder, thus getting a more perfect foothold in order to come down the ladder.”

Cases which are persuasive are the following:

In *Hanrahan v. Pacific Transport Co.*, 262 Fed. 951 (C.C.A. 2), it was held that the ship was not unseaworthy because a railing was temporarily not in place where a seaman fell overboard. The court said:

“\* \* \* and to say that this ship was unseaworthy because she had no handrail up, while lying alongside a wharf discharging cargo, is merely untrue.”

The court indicated that a ship need only be reasonably safe, not absolutely safe. Certiorari was denied by the Supreme Court; 252 U.S. 579.

A similar ruling was made in the case of *Adams v. Bortz*, 279 Fed. 521 (C.C.A. 2). See also: *In Re Tonawanda Iron & Steel Co.*, 234 Fed. 198, where the court held that the ship was not obligated to use the most modern appliances; and *The Santa Clara*, 206 Fed. 179, where there was not any hand rail around a hatch.

The case of *Biles v. United States*, 1949 A.M.C. 875, is very much in point. There the shipowner furnished a thirty-five foot carpenter's ladder as the means of boarding and leaving the vessel. Libelant fell while coming aboard. The court found that the vessel was not unseaworthy and stated that a ship owner is not required to furnish the best possible means but only that which is *reasonably* fit and *reasonably* safe for the purpose used. Citing the *Baymead*. The court also found the libelant fell because of the manner in which he was using the ladder.

Mr. Walter E. Brunsch, who was mate on the vessel but not in the employ of appellee, Pacific Far East Line, at the time of the trial, testified that in all his years of service on board cargo ships, he had never seen a hand pump used

for such a job as was done by the seamen in this case. Mr. Brunsch started serving in the forecastle and worked his way up to be a Master Mariner. He held that license when he was a witness. Libelant-appellant's brief indicates there has been some misapprehension in regard to the testimony of this witness. His testimony was in fact that he had never seen a hand pump used by the deck department except where the material had to be pumped to a *higher level*. To do that the deck department of a vessel would sometimes borrow a pump from the engineers. His testimony, given under cross-examination in that regard follows:

"Q. In your experience does the deck department ever borrow a hand pump from the engine department?

A. Yes.

Q. For what purpose would the deck department borrow such a pump?

A. To transfer coal oil *up* into the coal oil storage tank or your paint thinner." (Brunsch, Ap. p. 114)

\* \* \* \* \*

"Q. When you transfer paint thinner from fifty-gallon drums is there any reason why you need a hand pump?

A. *Because we would put it into a tank that is above the deck level.*" (Italics supplied.) (Brunsch, Ap. p. 115)

\* \* \* \* \*

"Q. As a matter of fact, you use these hand pumps frequently to transfer liquid from fifty-gallon drums whether it is to be transferred to above the deck level or not?

A. Are you asking me or telling me?



Q. I am asking you?

A. No.

Q. As a matter of fact, that is common practice aboard American merchant ships to transfer liquids out of fifty-gallon drums, isn't that a fact?

A. Not to my knowledge." (Brunsch, Ap. p. 116)

He had previously testified that he had never seen a hand pump used to transfer diesel oil from fifty-gallon drums (Brunsch, Ap. p. 115).

He further testified:

"Q. What is the process ordinarily used to transfer the paint from the large fifty or fifty-five gallon drum to the five-gallon paint pot?

A. Open up the air bung and the bigger bung and tilt it over into your pot that is standing underneath." (Brunsch, Ap. p. 109)

In response to questions by the court, this witness testified:

"Q. How many men does it require in an operation of that kind?

A. Usually two men to handle the drum and one to handle the bucket.

Q. That is, two men to tilt the drum?

A. One gets on each side and they tilt the drum, and the other fellow puts the bucket so you don't lose your material." (Brunsch, Ap. p. 110)

It should be added that this witness, when asked as to how many cargo ships he had served on during the course of his many years at sea, replied "Probably two or three hundred." (Brunsch, Ap. p. 111)

There is some hazard connected with almost every job done on board a ship, or in fact, any other place. But



there is no apparent reason why this simple job should not have been accomplished without anything happening which would cause injury.

It would seem that there was no necessity for Sundwall's holding the bucket the way he did hold it. He must have held it very close to his face because he had his right hand under the bottom of the bucket, which was a few feet (about  $2\frac{1}{2}$ ) in depth (Sundwall, Ap. p. 59), while holding the bail with his left hand (Sundwall, Ap. p. 61). There appears to be no reason why it should have been anticipated that he would do his part of the job that way. His conduct in that regard is comparable to the conduct of the libelant in the *Baymead* case, and also in the case of *Biles v. United States*, supra. In each of those cases it was solely the fault of the injured seaman that caused the mishap. The same is true in our case; or if it may be said libelant was not negligent, that the mishap was due to pure accident. Certainly there was nothing unusual or unsafe about either the drum or the paint bucket; and the same may be said about the tipping of a drum and the pouring of oil into a bucket.

What the court said in the Hanrahan case, supra, may be said in this case. It is "merely untrue" to say that failure to supply a hand pump rendered the vessel unseaworthy.

The trial judge who heard the oral testimony of both witnesses who testified as to the circumstances and the practice on board vessels found that the practice was in accordance with the testimony of the mate, Brunsch, and contrary to that of libelant. The court's finding was:

"The libelant did not prove that it was the custom or practice to provide a pump to remove oil from iron drums on the decks of such vessels." (Ap. p. 13)

The court also found that the vessel was not unseaworthy and the respondent not negligent (Ap. pp. 13, 14).

The court further found that any injury to libelant's left eye was either a simple accident or was due solely to libelant's own negligence in holding his face close to the bucket (Ap. p. 15).

The burden of proof is always on the complaining party, and for aught that appears in the record, it might well have been, at least libelant has not proved the contrary, that if a hand pump had been used, any hazard of splashing would have been present just the same.

---

For reasons which the foregoing indicates, it seems plain that the court was amply justified in finding that there was a failure of proof on libelant's part in respect to the allegation of negligence and also the allegation of unseaworthiness; and in dismissing the libel.

It may be added, although it would seem unnecessary, that it is established law in this circuit, as well as elsewhere, that the findings of the trial court will not be disturbed unless manifestly wrong, and that this is particularly true in those cases where the trial judge has the advantage of hearing the testimony of the witnesses in open court.

See: *Lillig v. Union Sulphur Co.*, 87 F.(2d) 277 (C.C.A. 9). In that case the trial court found that the injuries, although of a very serious nature, were not attributable in any way to *negligence* on the part of the respondent. This Court affirmed, saying:

“\* \* \* the findings are entitled to great weight and should not be upset, except for manifest error or unless it is shown that they are clearly wrong.”

There a carpenter's ladder which libelant was using to paint a ventilator while the vessel was at sea slipped, causing libelant to either fall with the ladder or from it.

See also: *Drain v. Shipowners and Merchants Tug Boat Co.*, 149 F.(2d) 845 (C.C.A. 9). In that case the trial court found that the owners were not *unskillful* or *negligent* in the instructions to the seaman, which finding, among others, was affirmed by this court. Reference was made to the well established rule that the trial court would not be reversed as to its findings unless clearly against the preponderance of the evidence. This court there said that all assignments or error at the hearing of the appeal were waived "except that embodying the main and controlling controversy as to whether on the evidence in the apostles it is established that libelee was *neglectful* of its duties towards the libelant, Drain, as its ordinary seaman, or whether his injury *had its sole cause in his own want of care* for his own safety in a place of danger." (Emphasis supplied.) This court affirmed the finding of the trial court.

It hardly seems necessary to say more than a few words in regard to the authorities cited by appellant. A case quoted from and apparently principally relied on is *Mah-nich v. Southern Steamship Company*, 321 U.S. 96, where petitioner fell from a staging and was injured. He was caused to fall because a rope used in rigging the staging was defective, and *actually carried away*. There was no question but that an unsafe piece of equipment was used. The only question presented was whether the fact that a good rope was on board and could have been used by the mate made the vessel seaworthy. The court held that it did not. It may be added that examination of the rope after the accident showed that it was so rotten as to be inade-

quate to support the strain imposed upon it. It is of interest that even in such a case two justices, Mr. Justice Roberts and Mr. Justice Frankfurter, dissented.

Appellant seems to have placed considerable reliance also upon the case of *Armit v. Loveland*, 115 F.(2d) 308, where it was charged that it was negligence on the part of the operator of the vessel to fail to provide splash plates about the engine which would have prevented oil being thrown on steps which the libellant, engineer, was obliged to use during very bad weather when the vessel was rolling and pitching. The case was tried before a jury and, of course, if there was any substantial evidence which would justify the jury's verdict, the appellate court would be bound by it. Further, the absence of splash plates obviously created a very unsafe condition and this was particularly so because the accident happened during very heavy weather. It, of course, was to be anticipated that a vessel might well encounter heavy weather while at sea. The case is therefore easily distinguishable.

---

There was a sharp issue in the instant case, as the record abundantly shows, as to whether the few drops of oil which splashed in appellant's left eye were the cause of subsequent diminution in the sight of that eye. The trial court, however, did not make any finding in that regard as it was not required to, finding, as it did, that there was not any unseaworthiness or fault. Appellant has seen fit, however, to discuss that issue and we shall therefore make a very brief reply and quote pertinent excerpts from the testimony, but merely for the purpose of bringing a more accurate and complete picture before the court.



When Sundwall joined the Iran Victory he was to all practical purposes totally blind in his right eye (Dr. Boyle, Ap. pp. 118, 122). He denied that he had knowledge of that although that appears wholly incredible (Sundwall, Ap. p. 33). And the vision in his left eye was substantially impaired. He had a heavy scar at 11 o'clock on the cornea of his left eye and the vision when examination was made in November, 1948, was 20/80. When he returned to the United States Marine Hospital, and after one or more operations had been performed on his left eye (and one on the right eye), the vision in the left eye was 20/200. It may be added that the Marine Hospital records show that there were lens opacities in his left eye shortly before he joined the Iran Victory in the spring of 1949 (Dr. Boyle, Ap. p. 141; Dr. Bricca, Ap. pp. 72, 93). The records of the United States Marine Hospital at San Francisco also reveal inflammation of the left eye from time to time over a period of years. Neither the doctor who was called by the libelant nor the one called by respondent could say for certain what caused the increased impairment of Sundwall's vision. However, Dr. Boyle who had been associated with Dr. Otto Barken for some twenty years, was of the opinion that the force of a few drops of oil striking the cornea, which is a tough membrane about equal to the skin on the back of one's hand, would not cause physical damage (Dr. Boyle, Ap. p. 120). As to whether it would cause an irritation which would set up an inflammation is problematical but was in Dr. Boyle's opinion quite unlikely because Sundwall washed the oil out immediately and continued to stand lookout for at least two days following the accident which required a usable left eye, i.e., one with sight unhindered by blinking and copious tears which would have been the case



had any irritation remained (Dr. Boyle, Ap. p. 122). As to the scarring which was found on the cornea of Sundwall's left eye, Dr. Boyle testified that it could have come either after or before the accident on the vessel. When he said it could have been caused by an injury in April, he was testifying in regard to the time element, not the actual cause (Dr. Boyle, Ap. p. 129). In regard to the cause, he testified that there are a variety of causes which produce ulcers the healing of which result in scarring (Dr. Boyle, Ap. pp. 130, 131). As to whether there was sufficient material in the oil to cause a burn and consequent scarring, Dr. Boyle testified that he made inquiries as to whether there was any acid or alkaline material in it which might burn the eye, and stated:

“It didn't seem to have any of those things (material), any that I had experience with that caused scarring of the eye.” (Dr. Boyle, Ap. p. 133)

The testimony of Dr. Bricca was, in the main, the same (Dr. Bricca, Ap. pp. 78, 79, 89).

In order to inform the court more exactly as to the testimony of the two doctors called by the respective parties in this case in regard to these pertinent points, excerpts have been selected and placed in Appendix “A.”

---

For the reasons indicated above, it is respectfully submitted that the findings of the trial court and disposition of the case were correct and should be affirmed.

Dated at San Francisco, California, December 21, 1951.

DORR, COOPER & HAYS

*Proctors for Respondent-Appellee.*

**(Appendix follows)**







## Appendix "A"

---

In comparing the irritation which Sundwall might have gotten from getting oil in his eye, Dr. Boyle testified as follows:

“Q. If it does have pain and injury, what is the physical effect on the patient?

A. Well, the patient has a sensation of pain, has tears and blinks the eye. It is the same sensation as a person getting a cinder in their eye, which is a well-known phenomenon.

Q. And ordinarily, Doctor, when you get a cinder in your eye, once the cinder is removed that is the effect of it?

A. The patient *is usually cured; ninety-nine times out of a hundred*, I should say.

Q. That is, if he got such an object as a cinder—how many times out of a hundred do you say, Doctor?

A. Ninety-nine times out of a hundred.

Q. Assuming that you had a fluid that was mildly irritating and within a comparatively short time after the mishap that caused the fluid to get in the eye, the eye was washed with luke warm water, and within an hour or two after that the eye was again washed, either with the assistance of another person or by the man himself, with an eye cup, what would you anticipate would be effect of removing any irritating cause?

A. Well, that would be considered good treatment, *and unless the fluid were something like lye or very strong acid or scalding material of some kind*, it should be sufficient to relieve the symptoms.” (Emphasis supplied.) (Dr. Boyle, Ap. p. 121)

\* \* \* \* \*



"Q. Now, Doctor, if there was serious irritation, irritation enough to cause an ulcer, from your experience over twenty years as a specialist, would you expect or would you consider it likely that a man could continue to work, which involved standing lookout on the head of the vessel and also standing a watch described as a wheel watch which involved looking at a compass—a lighted compass. Would you expect or anticipate if this were more than mildly irritating substance that a man would be able to do that sort of work?"

A. Well, if he had two eyes, he might be able to do it; but in this case the man had just one eye, and if there was any severe irritation he would be blinking, tearing and difficulty doing any work that requires use of the eyes." (Dr. Boyle, Ap. p. 122)

In regard to the cause of scars of the cornea, Dr. Boyle testified as follows:

"Q. Of course; I want you to answer it any way that enables you to portray the facts of the thing.

A. In the office we see many people with ulcers and scars of the cornea in the private practice, and more than half of them have ulcers or scars the cause of which we do not know or we cannot discover either.  
\* \* \*

(Dr. Boyle, Ap. p. 134)

Dr. Bricca testified in part as follows:

"Q. Would the introduction of any irritating substance possibly result in corneal opaqueness?

A. It is possible, yes." (Dr. Bricca, Ap. p. 78)

\* \* \* \* \*

"Q. Will you say a corneal opaqueness following irritation is a common experience?

A. It depends on the severity of the burn and the resistance of the patient and the treatment. I mean,

there are any number of variables." (Dr. Bricca, Ap. p. 79)

\* \* \* \* \*

"Q. So that I assume that had nothing to do with the condition of the cornea itself, did it?

A. I can't answer that in any thoroughness.

Q. The answer is you don't know; is that correct?

A. That is right." (Dr. Bricca, Ap. p. 83)

\* \* \* \* \*

"Q. My question is really directed as to the first, from the mere impact, drops of paint or oil, whichever it was, wouldn't cause serious damage?

A. Not unless they were thrown with violent force.

Q. If it just flashed up in your eye?

A. The actual impact would probably cause no damage.

Q. If there is any damage to the eye at all it would be because—assuming that it wasn't thrown with a lot of force, it would be traceable to the irritation if the substance was an irritating substance?

A. Yes.

Q. And not knowing the exact nature of the paint or oil, whichever this substance was, you couldn't say whether it would be sufficiently irritating to cause serious damage resulting in an ulcer to the eye?

A. That is true; I can't make that statement." (Dr. Bricca, Ap. p. 89)

\* \* \* \* \*

"Q. And in November, 1948, there was 20/80?

A. November 3, 1948, it states here—wait a moment; I will have to read these things. November 3, left eye, 20/80, yes.

Q. The normal eye is 20/20, or 10/10 as it is called, is it not?

A. Yes.

Q. Am I correct in believing from 20/40 to 20/80 it had gotten twice as bad?

A. No, no, it isn't a fraction; it is a statement of physical properties. It means that at twenty feet he sees what a normal person would see at forty feet. It isn't a percentage-wise thing. The actual vision decrease from 20/20 to 20/40—I believe it is not stated correctly; it is an approximation, it is around 20 or 25 per cent less vision.

Q. It had deteriorated at any rate?

A. He didn't see as much.

Q. In March of 1949, according to my notes here he had lens opacity in the left eye?

A. That is right.

Q. And opacity of course there means the same as it does in the cornea; it means you can't see through it?

A. That is right." (Dr. Bricca, Ap. pp. 93, 94)

No. 13062

---

United States  
Court of Appeals  
For the Ninth Circuit.

---

ALBERTY FOOD PRODUCTS, a Partnership,  
and ADA J. ALBERTY, HARRY AL-  
BERTY, FLORENCE ALBERTY, MAR-  
GARET QUINN and HELEN HACK-  
WORTH, Individually and as Copartners,  
Appellants,

vs.

UNITED STATES OF AMERICA,  
Appellee.

---

Transcript of Record

---

Appeal from the United States District Court,  
Southern District of California,  
Central Division.

FILED

NOV 14 1951





No. 13062

---

United States  
Court of Appeals

For the Ninth Circuit.

---

ALBERTY FOOD PRODUCTS, a Partnership,  
and ADA J. ALBERTY, HARRY AL-  
BERTY, FLORENCE ALBERTY, MAR-  
GARET QUINN and HELEN HACK-  
WORTH, Individually and as Copartners,  
Appellants,

vs.

UNITED STATES OF AMERICA,  
Appellee.

---

Transcript of Record

---

Appeal from the United States District Court,  
Southern District of California,  
Central Division.



## INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Amended Complaint for Injunction.....	3
Appellants' Designation of the Record Material to the Consideration of This Appeal and to Be Printed .....	90
Certificate of Clerk .....	88
Exhibit, United States':	
No. 38—Oxorin Tablets Formula .....	81
39—Special Formula Tablets .....	82
40—Cheno Combination Tablets Formula .....	83
41—Pandora Tablets Formula .....	84
42—Recal Formula .....	85
43—New R-Gon Formula .....	86
44—Alberty Laxative Blend Formula.	87
Findings of Fact and Conclusions of Law on Application for Permanent Injunction .....	66
Memorandum to Counsel .....	44
Memorandum of Decision .....	53
Motion for Summary Judgment and Notice of Motion .....	47

INDEX	PAGE
Names and Addresses of Attorneys .....	1
Notice of Appeal .....	81
Notice of Hearing of Motion for Summary Judgment .....	52
Order Discharging Order to Show Cause Re Preliminary Injunction .....	29
Order Granting Permanent Injunction .....	73
Order for Pre-Trial Proceedings .....	30
Pre-Trial Statement of Issues as Stipulated...	42
Pre-Trial Stipulation .....	35
Statement of Facts That Are Material and Exist Without Controversy .....	50
Statement of Points on Which Appellants In- tend to Rely on the Appeal .....	92
Stipulation .....	95
Substitution of Attorneys .....	80
Supplemental Stipulation .....	51
Writ of Injunction .....	76

## NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

EUGENE M. ELSON,  
541 S. Spring St.,  
711 Spring Arcade Bldg.,  
Los Angeles 13, Calif.

For Appellee:

ERNEST A. TOLIN,  
United States Attorney;  
CLYDE C. DOWNING,  
TOBIAS G. KLINGER,  
Assistants U. S. Attorney,  
600 U. S. Post Office &  
Court House Bldg.,  
Los Angeles 12, Calif.





In the United States District Court for the Southern  
District of California, Central Division

Civil Action No. 10,322 W

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALBERTY FOOD PRODUCTS, a Partnership,  
and ADA J. ALBERTY, HARRY ALBERTY,  
FLORENCE ALBERTY, MARGARET  
QUINN, and HELEN HACKWORTH, In-  
dividually and as Co-partners,

Defendants.

## AMENDED COMPLAINT FOR INJUNCTION

United States of America, plaintiff herein, by and through James M. Carter, United States Attorney for the Southern District of California, Central Division, respectfully represents to this Honorable Court as follows:

1. This proceeding is brought under section 302(a) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 332(a)], hereinafter referred to as "the Act," specifically investing the several United States District Courts with jurisdiction to enjoin and restrain violations of section 301 of said Act (21 U.S.C. 331) as hereinafter more fully appears.

2. The defendant, Alberty Food Products, is a partnership having its principal place of business at 729 N. Seward Street, Hollywood, California. The

partnership also trades and does business under the name of Cheno Products. The defendants, Ada J. Alberty, Harry Alberty, Florence Alberty, Margaret Quinn, and Helen Hackworth, residents of the County of Los Angeles, State of California, are primarily responsible for the policies and activities of the partnership. [2\*] Alberty Food Products and the defendants, Ada J. Alberty, Harry Alberty, Florence Alberty, Margaret Quinn, and Helen Hackworth, are the manufacturers, packers, and distributors of certain articles of drug hereinafter designated by name.

3. Such drugs are designated by name, as follows: Alberty's Vegetable Compound Capsules; Alberty's Oxorin; Alberty's Food Regular; Instant Alberty Food; Alberty Garlic Perles (Alberty Garlic and Vegetable Oil Perles); Alberty's Sabinol; Alberty Phloxo B Tablets; Alberty's Phosphate Pellets; Alberty's Riol Tablets; Alberty's Rico Tablets; Alberty Special Formula Tablets; Alberty's Vitamin A (High Potency) Shark Liver Oil; Alberty's Vi-C; Wheat Germ Oil; Alberty's Vitamin B Complex Tablets with High-Potency B1; Alberty's Vitamin B1 with Supplementary Amounts of Other B Complex Factors; Alberty's Lebara Pellets, Plain; Alberty's Lebara Pellets; No. 2; Cheno Herb Tea; Cheno Phytolacca Berry Juice Extract Tablets; Cheno Combination Tablets; Tablets Pandora; Recal Tablets; Alberty's Vio-Min Vitamin-Mineral Tablets; Alberty's R-Gon Tablets;

---

\*Page numbering appearing at foot of page of original Certified Transcript of Record.

Alberty's Laxative Blend Tea; Alberty's Ca-Mo Pellets; Alberty's Vitamin A and G Perles; Alberty's Rego.

4. For some years, defendants have introduced said articles of food and drug into interstate commerce, and have caused said articles to be accompanied by various leaflets and booklets when introduced into and while in interstate commerce and while held for sale after shipment in interstate commerce. Said leaflets and booklets are entitled "Calcium, The Staff of Life," "Dynamic Digests," "Is There Hope That Graying Hair Can Be Restored? Read What Science Says—Pandora," "Health Mysteries?," "Happy Figures by the Cheno Plan," "Reduce! Streamline Your Figure—Follow the 5 Factor Cheno Plan." Each of these booklets and leaflets relates to one or more of the above-mentioned articles of drug and contains false and misleading statements (a) regarding the nutritional and health-giving qualities of said articles, (b) regarding the effect of said articles on the structure and functions of the human body, and (c) in that they represent and suggest that such articles are effective in the treatment, prevention, and cure of the diseases, symptoms, and conditions as hereinafter specified: [3]

(a) Alberty's Vegetable Compound Capsules:

Health Mysteries (page 16)

Malfunctions of certain organs rendering persons unable to tolerate starch and sugar in the

same proportions as the normal individual (diabetes).

Calcium, *The Staff of Life* (page 48)  
For diabetes

(b) *Alberty's Oxorin*

*Health Mysteries* (pages 16 and 26)

*Dynamic Digests* (page 15)

Pernicious anemia; lack of strength and vitality; need of more sleep than is normally required; chronic fatigue; low blood pressure, poor circulation, and lowered resistance to infection; gas after eating; providing robust bouyant health and stamina; a condition in which one is weary, tired, rundown, just dragging oneself around with no ambition left, when every effort one makes seems to leave one weak and spent; weakness; thinness, and preventing the lowering of the natural resistance of the body while the starch and sugar intake is kept at a minimum in persons suffering from malfunction of certain organs rendering them unable to tolerate starch and sugar in the same proportions as the normal individual.

Calcium, *The Staff of Life* (pages 46-48)  
For diabetes. For early fatigue, weakness, low blood pressure, pernicious anemia; to provide buoyant health, to benefit general lassitude, weary, general "rundown" feeling, lowering resistance.



(c) Alberty's Food Regular, and Instant Alberty Food

Health Mysteries

(pages 16, 20, 21, 22, 23, 26, 35)

Dynamic Digests

(pages 2, 3, 6, 16, 17, 19, 28)

Giving relief in a few days to persons suffering from ulcers, colitis, and hyperacidity; enabling thousands [4] to receive new strength and vitality within a short time; ulcerated stomach; relieving anemia and general rundown condition in persons suffering from malaria fever; curing in eight months duodenal ulcers of five years' standing; tuberculosis; relieving stomach trouble; remedying deficient conditions where certain cells, tissues and glands have been affected through the medium of the nervous system, blood, cells, tissues, liver, kidneys and other glands of the body; remedying urinary discomforts; remedying arthritis or rheumatism; building blood; furnishing mineral elements and nourishment so that the natural resistance of the body is not lowered and the starch and sugar intake is kept at a minimum in persons suffering from malfunction of certain organs rendering them unable to tolerate starch and sugar in the same proportions as the normal individual; (in addition further representations in the case of Instant Alberty Food) assuring strong, healthy bodies for the joyous years ahead; providing increased

strength, pep and stamina; remedying pale, weak, undernourished conditions; thin and scrawny bodies; preventing or remedying "falling below par"; and continued weakness and tiredness; remedying eczema;

Calcium, The Staff of Life (pages 6, 7, 8, 10 to 23 inclusive, 38, 48, 49, 50, 62 and 63, 65 and 66, and 44)

For diabetes. For nervousness, nausea, diarrhea, stomach irritation, malassimilation, pain on eating, underweight; for changing one's personality; making a positive personality out of a negative personality; effecting a more youthful appearance; to counteract stomach distress and yellowing of the skin, to remedy [5] severe pain and other symptoms of an upset digestive tract; for stomach and intestinal pain; mucous colitis, stomach distress, catarrhal condition; for enabling sickly, premature, and cadaverous infants to become well and healthy, infantile eczema, gastric ulcer, malassimilation, inability to gain weight, dormant liver, toxic condition, soft and flabby flesh; remedy prolapse of the intestines; overcome faulty nutrition and the effects of faulty nutrition, toxemia, liver, or urinary disorders and ailments that have been years in developing, gastric ulcer, arthritis, rheumatism, kidney involvement, general run-down condition, malnutrition, acidity, hay fever, eczema, vomiting, toxic poisons,

disturbed nervous system, kidneys unable to excrete poisons; for eliminating toxic poisons and fixed acids and causing liver, kidneys, and other vital organs to function normally; for deficiency conditions where cells, tissues and glands have been affected; as a remedy for hay fever, hives, and acne; for clearing the skin; for sinusitis, for scurvy, rickets and anemia.

(d) **Alberty Garlic Perles (Alberty Garlic and Vegetable Oil Perles)**

Health Mysteries (pages 23 and 24)

Dynamic Digests (page 23)

High blood pressure; various gastro-intestinal disorders; heart failure; hardening of the arteries; gastritis; some forms of dyspepsia; peptic ulcer; exerting an anti-diarrheal effect in gastro-intestinal disease; producing certain desired results in amebic dysentery and some forms of cholera; fighting staphylococci which abound in boils and carbuncles; lessening the growing power of germs and impairing [6] their oxygen metabolism; waging war against types of germs which are not attacked by penicillin; cramping the style of paratyphoid bacteria; and remedying the effects of over-indulgence in alcoholic drinks.

Calcium, The Staff of Life (pages 34 and 35)

For high blood pressure.

## (e) Alberty's Sabinol

Health Mysteries (page 28)

Dynamic Digests (pages 28 and 29)

For urinary discomforts; dull, achy feelings across the back and sharp pains in the kidneys; getting up frequently during the night; spots before the eyes; swelling of the feet, ankles, and lower limbs; dark circles beneath the eyes and puffiness; lack of vitality; favorably affecting the liver; promoting the flow of bile; remedying renal (kidney) troubles; for urinary discomforts and pain in kidneys; increasing the flow of urine and lessening its acidity; rendering the kidneys O. K. and flushing the kidneys; for inflammation of the kidneys, Bright's disease, dropsy, edema, tumor, stone, and tuberculosis.

Calcium, The Staff of Life (page 51)

For kidney diseases, bags under the eyes, frequent getting up nights, inflammation of the kidneys, Bright's Disease, dropsy, edema, abscess, tumor, kidney stone, tuberculosis, enuresis (bed-wetting), dysuria (painful urination); for increasing flow of urine and lessening its acidity.

## (f) Alberty Phloxo B Tablets and Alberty's Phosphate Pellets

Health Mysteries (page 24)

Dynamic Digests (pages 8 and 28)

Preventing long-continued loss of sleep, disturbed sleep, premature old age, insanity; preventing the brain cells from losing their



recuperative powers and [7] their ability to eliminate the day's accumulation of waste products; preventing a depressed functioning throughout the whole system; preventing the nervous system from becoming adversely affected; inducing natural and healthful sleep; giving a soothing, relaxing effect; preventing nerves from being starved; for insomnia, nervousness, upset feeling, irritability; soothes and relaxes taut nerves; for highly nervous and excitable conditions; for inducing sleep to alcoholic addicts; and substituted for barbituric acid for sleeplessness.

Calcium, *The Staff of Life* (pages 52 and 53, 62 and 63, 65 and 66)

For nervousness, starved nerves, neurasthenis, nervous debility, worry, constant mental strain, acidosis, chronic diseases, sexual excesses, dysfunction of the ductless glands, anemia, Asthenia, insomnia, irritability, taut nerves, long continued abuse of the nervous system, worry, grief, too little sleep, mental exertion, over-indulgence in stimulants, degenerative diseases; for perfect development and maintenance of a normal, healthy brain and nervous system; to prevent inadequate sleep robbing the brain cells of their recuperative powers and ability to eliminate the day's accumulation of waste products; for asthenia; to remedy effects of faulty nutrition, toxemia, acidity, liver or urinary disorders and ailments that have been years in developing,



gastric ulcer, arthritis, rheumatism, kidney involvement, general run-down condition, malnutrition, acidity, hay fever, eczema, vomiting, toxic poisons, dormant liver, disturbed nervous system, kidneys unable to excrete poisons; for eliminating toxic poisons and [8] fixed acids and causing liver, kidneys, and other vital organs to function normally; for deficiency conditions where cells, tissues, and glands have been affected; for eczema, gastric ulcers, hay fever.

(g) Alberty's Riol Tablets

Dynamic Digests (pages 13 and 26)

For hay fever, sneezing, blowing, sniffing, allaying the distressing symptoms of hay fever, asthma, and other allergies.

Calcium, The Staff of Life (pages 54, 55 and 56)

For allergies; asthma; Vincent's Angina; gum diseases; hay fever; eczema; dry, scaling skin; ridged and splitting nails; dry, lifeless hair, profuse dandruff; certain kidney disorders.

(h) Alberty's Rico Tablets

Health Mysteries (page 29)

Dynamic Digests (pages 24 and 28)

Calcium, The Staff of Life (pages 60 and 61)

For arthritis; neuritis; rheumatism, including stiff, painful, swollen, and deformed joints and inflamed and painful muscles; preventing chronic sepsis; preventing urate deposits in muscles and mineral deposits in joints.

## (i) Alberty Special Formula Tablets

Health Mysteries (page 15)

Dynamic Digests (page 13)

Calcium, The Staff of Life (page 67)

Feeding the glands of humans; stimulating the white blood corpuscles, acting as a brake on sugar metabolism; favorably affecting the adrenal glands and liver; stimulating regeneration of the blood and beneficial in the anemias; preventing many malfunctions; treating symptoms of the nervous and glandular systems of the body, and feeding the orchic (male) glands. [9]

## (j) Alberty's Vitamin A (High Potency) Shark Liver Oil

Health Mysteries (page 14);

Dynamic Digests (page 22);

Calcium, The Staff of Life  
(pages 63, 66, 73, 74, and 75)

For the relief of sinus discomfort, sinusitis; protection against colds; preventing infection of the sinuses, the respiratory tract, and the genito urinary system; treating acne; maintaining normal cell structure; giving health to the mucous membranes of the nose, sinuses, throat, bronchi, upper respiratory tract, eyes; providing normal denture formation of the teeth; healthful breast milk; building resistance to colds, infection of the eyes; preventing lack of energy; to benefit skin eruptions, dry skin, eczema, poor eyesight, inflamed membrane lining

of various parts of the body as nose, throat, lungs, urinary and reproductive organs; for sinusitis, colds, bad eyesight; to relieve tired, strained eyes; to prevent or remedy dry skin, impairment of teeth and bones, lack of energy.

(In Health Mysteries and  
Dynamic Digests only)

Preventing cirrhosis of the liver and suffering from liver disease, preventing formation of kidney stones.

(In Health Mysteries only)

Preventing children's diseases and retarded growth.

(k) Alberty's Vi-C

Health Mysteries (page 23)

Dynamic Digests (page 12)

Calcium, The Staff of Life  
(pages 63, 66 and 81)

For maintaining a healthy condition of the blood capillaries, teeth, bones, respiration, oxidation, and as an aid to healing, especially cuts and wounds; maintaining normal body chemistry; enabling certain cells and tissues to perform their functions normally and preventing untold misery; aiding in holding cells [10] and tissues together; aiding cells to perform their functions normally; preventing weak blood vessels, teeth from losing their normal structure and becoming diseased, gums from swelling and

bleeding, teeth from becoming loose and falling out, the skin from becoming dry and rough, and slight bruises from causing bleeding under the skin; preventing bad teeth; as an aid in almost every bodily activity; aiding clear reasoning, especially in time of mental strain; relieving pain after tonsil removal; relieving muscle cramps; to benefit hay fever, asthma, allergy; to insure a healthy condition of the blood capillaries, teeth, and bones; to insure proper respiration, oxidation, and healing.

(In Health Mysteries and  
Dynamic Digests only)

Lowering the blood sugar level in diabetes, improving hair growth and coloring; providing nutrition to the thyro-adrenal system; aiding in formation of hemoglobin; enabling the bone marrow to produce the needed cell forms and the blood to take up oxygen from the lungs; preventing chronic fatigue and lowered resistance.

#### (1) Wheat Germ Oil

Dynamic Digests (page 20) and Calcium,  
The Staff of Life (pages 82 and 83)

To prevent sterility; for enabling pregnant women to give birth to children more capable of acquiring intelligence than ordinary children; to permit functioning of the anterior pituitary gland; for affecting the development of the internal organs and sex glands, the quality and



quantity of mother's milk, growth and development and functioning of the thryoid gland [11] and pancreas; to benefit certain types of paralysis in humans; for ridding patients of primary fibrositis which cripples the muscles, muscular atrophy.

(In Dynamic Digests only)

For treating unfortunates suffering particularly from dementia praecox (insanity); improvement of all bodily functions of muscular vigor and mental reorganization of those suffering from dementia praecox, a form of insanity; for producing greater intelligence, quick, brilliant minds; livening the mental faculties; raising mental acumen.

- (m) Alberty's Vitamin B Complex Tablets with High-Potency B<sub>1</sub>; Alberty's Vitamin B<sub>1</sub> with Supplementary Amounts of Other B Complex Factors

Health Mysteries (pages 12, 13 and 18);  
Dynamic Digests (page 25); and Calcium, The  
Staff of Life (page 78)

To prevent poor health; to benefit growth, appetite, digestion; for flatulence, headaches, dyspepsia, lack of stamina, chronic fatigue, nerves and intestinal activity, constipation; for improving the appetite and nutrition; gaining weight; toning the digestive tract; increasing endurance and energy and benefiting the glands; to benefit vital organs, nervous system, chronic arthritis, and some forms of neuritis; as a bene-



fit as a tonic; for giving a "lift" that carries one through "trying" days with energy to spare at the end of the day; enabling housewives, school teachers, salesmen, etc., to do their work with much less effort; preventing chronic ill health; for certain cases of heart disease and some cases of arthritis and neuritis; increasing the body's output of insulin and sugar tolerance with special interest to the diabetic; [12] to benefit mental cases and for improving the intelligence of school children; for benefiting totally unemployable men and women, some of whom may be insane.

(In Health Mysteries and Dynamic  
Digests only)

Producing general fitness; affecting metabolism, growth, and development, correcting constipation, enabling one to recapture his vitality.

(In Health Mysteries only)

Stimulating; exerting a pep-up action; making the performance of ordinary tasks easier, shorter, and more bearable; preparing one against unexpected emergencies of illness or work; making one feel better and a little less tired at the end of the day; causing one to feel better and look younger; assuring against being let-down; acting as a safeguard against dragged-out, all-in, tired, nervous symptoms; and preventing suffering of the digestion, nerves, and intestinal activity; and providing general well-being.

- (n) Alberty's Lebara Pellets (Alberty's Lebara Plain and Alberty's No. 2)

Dynamic Digests (pages 7, 18 and 28), and Health Mysteries (pages 30 and 31), and Calcium, The Staff of Life (pages 56, 57, 62, 63, 65 and 66)

For bilious, sallow, or acid complexion; to produce a healthy, active liver, clear skin, bright eyes; for preventing excessive acid condition, keeping the liver cells active and healthy, enabling them to render harmless all poisons and acids received by the blood from the digestive tract; for toxic condition and other symptoms of a deranged liver; for preventing damaged and sluggish liver cells, destroying or transforming poisons or other harmful substances which [13] would otherwise kill one; preventing toxic wastes from entering the blood-stream; protecting the body from acidosis; preventing inability to digest fats, starches and sweets; preventing toxemia, acidity, bilious complexion, yellowish discoloration of the skin and whites of the eyeballs and frequently cases of intestinal indigestion. To remedy faulty nutrition, toxemia, acidity, liver or urinary disorders and ailments that have been years in developing, gastric ulcer, arthritis, rheumatism, kidney involvement, general run-down condition, malnutrition, acidity, hay fever, eczema, vomiting, toxic poisons, dormant liver, disturbed nervous

system, kidneys unable to excrete poisons; for eliminating toxic poisons and fixed acids, causing liver, kidneys, and other vital organs to function normally; for deficiency conditions where cells, tissues and glands have been affected. For rebuilding damaged liver cells, relieving symptoms of congestion of the liver, for eczema, gastric ulcers, hay fever, hives, acne, sinusitis.

(In Dynamic Digests only, pages 7, 18 and 28)

To remedy conditions of the liver which prevent toleration of fats, sweets, and starches; chronic indigestion due to disfunctions of the liver; abused liver which can no longer protect the body; overworked liver which is not able to prevent harmful toxic wastes and material from the bile entering the blood stream; toxic condition; yellowish discoloration of the skin and the whites of the eyes; jaundice; inactive liver and other liver ailments, such as biliousness and intestinal indigestion; malassimilation; dropsy; toxemia; [14] liver and gall-bladder disorders; prevention of certain liver and gall-bladder disorders which lead to the development of gallstones; disease of the gall bladder and stomach disorders resulting therefrom; prevention of allergy to citrus fruits and many other items of food; bilious, sallow or acid complexion; rendering the liver healthy and active thereby rendering the skin clear and healthy and the eyes clear and bright; keeping the liver

cells in an active, healthy condition so that they can render harmless all the poisons and acids that the blood receives from the digestive tract, thus preventing the individual from becoming toxic or developing other symptoms of a deranged liver; to repair damaged liver cells, increase flow of bile and relieve inflammation of liver.

(In Health Mysteries only, pages 30 and 31)

Activating the liver; below-par health; acidosis and resulting ill health, weakness, and premature old age; bringing about a normally healthy condition; filling one with vitality and the stamina allowed by one's age; preventing depletion of the fixed alkalis of the body in an effort to maintain blood alkalinity, and relieving acidosis which hampers cell reproduction, irritates the nerves, prevents proper assimilation of foods, destroys fats and retards elimination of waste products and toxic poisons and is present in rheumatism, skin disorders, mucous colitis, neuritis, kidney involvement, asthma and inflammation of the gall bladder. [15]

- (o) Cheno Herb Tea; Cheno Phytolacca Berry Juice Extract Tablets; Cheno Combination Tablets

Health Mysteries (page 2);

Dynamic Digests (pages 30 and 31)

Happy Figures by the Cheno Plan; and Reduce! Streamline Your Figure Follow the 5 Factor Cheno Plan



By the action of these products, cause a reduction of body weight apart from that which might be caused by the diet recommended.

(p) Tablets Pandora

Is There Hope That Graying Hair Can Be Restored? Read What Science Says—Pandora (leaflet);

Dynamic Digests (pages 10 and 11)

Postponing and stopping the graying of hair; preventing hair worries; restoring hair; restoring the natural color of hair; benefiting the entire system; preventing skin and tissues from becoming too dry; increasing blood volume, and stimulating the peripheral nerves; relieving hay fever; preventing destruction of hair follicles; and preventing listlessness and constant fatigue.

(q) Recal Tablets

Dynamic Digests (page 14);

Health Mysteries (pages 8 and 9)

Below-par conditions due to over-acid condition; preventing and correcting changes in the hormones including those secreted by the thyroid, parathyroids, testicles, ovaries, pituitary adrenals; lowered resistance to infections, ailments and disease, obviating destructive effects of excess acid on the cells of the body; upbuilding of the cells and tissues; obviating the effects of over-acid condition in hampering cell repro-



duction, lessening the blood's capacity to carry oxygen and irritating the nerves; [16] assisting complete assimilation of fats and elimination of toxic poisons and other waste products thus preventing neuritis, rheumatism, gout, kidney involvement, asthma, heart trouble, inflammation of the gall bladder, ulcers and abscesses; favorably affecting all forms of disease, acute and chronic; preventing malfunctioning of the nervous, muscular, and digestive systems.

(In Health Mysteries only)

Maintaining the chemical balance of the fluids of the thyroid gland; preventing and correcting nervousness; lack of energy; and preventing signs of early aging.

(r) Alberty's Vio-Min Vitamin-Mineral Tablets

Health Mysteries (page 10)

Building strength and resistance to disease; preventing degeneration of body cells, depletion of the reserves of the body, suffering of the glands, premature old age, haggard, dopey feeling, constant tiredness, lack of pep or energy to do more than drag around from day to day; causing the cells to really begin to live; rendering one alive, vital, gloriously healthy to the very fingertips; and putting one in the pink of condition, thus automatically increasing the body resistance to high up in the safety zone.

(s) Alberty's R-Gon Tablets

Dynamic Digests (page 21)

Preventing stomach ulcers; impairment of the nervous system and digestion caused by worry, anger, strain, emotional stress and long hours of fatiguing work; protecting the stomach from the ill effects of alcohol and irritating foods; gnawing pain of the stomach; and perforation peritonitis. [17]

(t) Alberty's Laxative Blend Tea

Dynamic Digests (page 13);

Health Mysteries (page 15)

Correcting a tired, lazy, sluggish feeling.

(u) Alberty's Ca-Mo Pellets

Calcium, The Staff of Life (page 45)

For teething children, as a preferred source of calcium.

(v) Alberty's Vitamin A and G Perles

Calcium, The Staff of Life (page 76)

For preventing eye disease and cataracts and to aid vision.

(w) Alberty's Rego

Calcium, The Staff of Life (page 72)

For preventing colds, for the relief of common and "grippy" colds, to benefit sneezing, chilly, watery eyes, aching muscles, headache, raw-irritated throat.

5. In addition, said defendants cause to be disseminated and sponsored from time to time, information and advice relative to the alleged merits of such articles of drug by the use of demonstrators at various cities throughout the United States, generally in so-called "Health Food" stores, which information and advice is to the effect that such articles are effective for the purposes set forth in such booklets and leaflets.

6. A typical scheme of distribution and method adopted by said defendants to sell and market such articles of drug has been to enter into an oral agreement with the operator of a so-called "Health Food" store. The defendants ship their products directly to the store where the products are sold to the public. The leaflets and booklets are shipped by defendants from Hollywood, California, to an individual or distributing organization designated by the storekeeper. The local individual or organization, or in some instances the defendants themselves, mail said leaflets and booklets to persons whose addresses are supplied by the storekeeper. When the supply of literature is depleted, the storekeeper notifies defendants who ship a new supply of said leaflets and booklets directly to the local repository. From time to time [18] these storekeepers have permitted prospective customers to read such literature while present in the store. Should the customer purchase an Alberty product or indicate any interest in these products, his name and address are solicited by the storekeeper and copies of said leaflets and

booklets are mailed him from the local repository. Demonstrators sent by defendants make the rounds of these stores extolling the virtues of Alerty Products, making substantially the same representations as do the booklets with respect to these articles. The demonstrator in some cases displays the booklets and leaflets and permits them to be read in the store. Again the names and addresses of those interested are solicited and the booklets are sent out through the mail.

7. Said articles of drug consist for the most part of dried vegetables, cereals, vitamins, and minerals in various combinations. The composition of said articles is such that they will not be effective, alone or in combination as represented in the leaflets and booklets, to fulfill the promises of benefit made for them in the manner and by the means hereinbefore outlined, or in any other manner.

8. The defendants from time to time have been and are now introducing and causing to be introduced, and delivering and causing to be delivered for introduction into interstate commerce at Hollywood, California, in violation of Section 301(a) of the Act [21 U.S.C. 331(a)] the above-named articles of drug. Further, the defendants have been doing or have caused to be done and are doing or causing to be done certain acts with respect to said articles of drug, while said articles are being held for sale after shipment in interstate commerce, which results in said articles being misbranded in violation of said Section 301(k) of the Act [21 U.S.C. 331(k)].



9. All of said articles when introduced into interstate commerce are drugs within the meaning of Section 201(g) of said Act [21 U.S.C. 321(g)], and have been and are misbranded when introduced into interstate commerce within the meaning of section 502(a) of the Act [21 U.S.C. 352(a)], in that their labelings are false and misleading since said articles are not efficacious for the prevention, treatment, or cure of the diseases or conditions for which they are respectively represented or suggested in said labeling. [19]

10. At all times, the aforesaid articles of drug, when introduced into interstate commerce, have been and are now misbranded within the meaning of section 502(f)(1) of the Act [21 U.S.C. 352 (f) (1)], in that their labelings fail to bear adequate directions for use for the purposes and conditions for which they are intended.

11. Defendants have caused and are causing certain printed and graphic matter, in addition to the leaflets and booklets enumerated in paragraph 4, to be used with and to accompany the aforesaid articles of drug while said articles were and are held for sale after shipment in interstate commerce, which act results in said articles being misbranded within the meaning of Section 502(a) of the Act [21 U.S.C. 352(a)], in that said printed and graphic matter contains false and misleading statements similar to those specified in paragraph 4 regarding the nutritional and therapeutic effects of said articles, in violation of Section 301(k) of the Act [21 U.S.C. 331(k)].



12. Defendants have also caused and are causing certain oral representations to be made by demonstrators regarding the therapeutic effect of said articles of drug while said articles were held for sale after shipment in interstate commerce, which act results in said articles of drug being misbranded within the meaning of section 502(f)(1) of the Act [21 U.S.C. 352(f)(1)], in that the labelings of said articles of drug failed to bear adequate directions for use for the purposes for which they were recommended by such oral representations sponsored by said defendants, while said articles were held for sale after shipment in interstate commerce, in violation of section 301(k) of the Act [21 U.S.C. 331(k)].

13. The defendants are well aware that their activities are violative of the Act. Under the Federal Food and Drugs Act of 1906 there are at least 12 notices of judgment reporting termination of seizure cases against some of these products. The defendant Ada J. Alberty was twice convicted under that Act. Under the Federal Food, Drug and Cosmetic Act of 1938, six seizure actions against Alberty Products have been terminated in favor of the Government, and several others are now pending; conviction of defendant Ada J. Alberty in this Court was reversed by the Court of Appeals in *Albert v. United States*, 159 F. (2d) [20] 278, on grounds of statutory construction later held invalid by the Supreme Court in two unrelated cases, Kor-

del v. United States, 69 S. Ct. 106, and Urbuteit v. United States, 69 S. Ct. 112.

14. The plaintiff is informed and believes that unless restrained by the Court, the defendants will continue to introduce and deliver for introduction into interstate commerce the said articles of drug misbranded in the manner aforesaid and will continue to do those acts, while holding said drugs for sale after shipment in interstate commerce which result in misbranding in the manner aforesaid.

Wherefore, plaintiff prays:

That the defendants, Alberty Food Products, a partnership, and Ada J. Alberty and Kenneth Hackworth, individuals, and each and all of their officers, agents, representatives, servants, employees, and attorneys, and all persons in active concert or participation with any of them, be perpetually enjoined from directly or indirectly introducing or causing to be introduced and delivering or causing to be delivered for introduction into interstate commerce, and from doing or causing to be done any act with respect to said articles while held for sale after shipment in interstate commerce which act results in such articles being misbranded, in violation of Section 301(a) and (k) of said Act [21 U.S.C. 331(a) and (k)], articles of drug, hereinbefore enumerated, or by any other designation, or any similar drug, misbranded within the meaning of sections 502(a) and 502(f)(1) [21 U.S.C. 352(a) and 352(f)(1)].

That an order be made and entered herein directing the defendants to show cause, at a time and place to be designated in such order, why they should not be enjoined and restrained as herein prayed during the pendency of this action; that upon the hearing of said order to show cause, a preliminary injunction be granted restraining the defendants as herein prayed during the pendency of this action; that the plaintiff be given judgment for its costs herein and for such other and further relief as to the court may seem just and proper.

/s/ MAX F. DEUTZ,

Assistant U. S. Attorney.

[Endorsed]: Filed October 7, 1949. [21]

---

[Title of District Court and Cause.]

## ORDER DISCHARGING ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION

The above-entitled matter having come on regularly for hearing before the Honorable William C. Mathes on November 28, 1949, the plaintiff appearing by Ernest A. Tolin, United States Attorney, Clyde C. Downing and Max F. Deutz, Assistant United States Attorneys, and the defendants appearing by their counsel, William V. O'Connor; the plaintiff having moved that the Order to Show Cause re Preliminary Injunction be discharged without prejudice, and good cause appearing therefor.

Now Therefore, It is Hereby Ordered, Adjudged and Decreed that the Order to Show Cause re Preliminary Injunction heretofore issued on October 7, 1949, be discharged without prejudice.

Done in Open Court Nov. 28, 1949.

/s/ WM. C. MATHES,  
United States District Judge.

Submitted by:

/s/ MAX F. DEUTZ.

Approved as to Form:

/s/ WILLIAM V. O'CONNOR.

[Endorsed]: Filed December 1, 1949. [26]

---

[Title of District Court and Cause.]

### ORDER FOR PRE-TRIAL PROCEEDINGS

Good cause appearing therefor, upon the Court's own motion it is Ordered:

[1] That this case be placed on calendar for pre-trial hearing in Court Room No. 2 of this Court at 10 o'clock on January 23, 1950, pursuant to Rule 16 of the Federal Rules of Civil Procedure, and local rules 9, 10 and 11 of this Court; and unless excused for good cause, each party appearing in the action shall be represented at all pre-trial hearings, and at all meetings held pursuant to [2] hereof,



by the attorney who is to conduct the trial on behalf of such party.\*

[2] Not later than fifteen days in advance of the pre-trial hearing, the attorneys for the parties appearing in the case shall meet at a mutually convenient time and place, and:

[a] exhibit to opposing counsel all documents (other than those to be used for impeachment) intended to be offered at the trial by each party represented;

[b] formulate a concise statement of the facts involved, as claimed by each party; and

[c] ascertain [i] which facts are to be admitted by all or any of the parties for the purposes of the trial, [ii] which facts, although not admitted, are not expected to be contested at the trial, as counsel are presently advised, and [iii] which issues of fact the respective parties intend to litigate upon the trial. [27]

[3] Not later than ten days in advance of the pre-trial hearing, each party appearing shall serve and file with the Clerk a "Memorandum of Law" containing a brief statement of the points of law, and a citation of the authorities in support of each point, upon which such party intends to rely at the trial.

[4] Not later than five days in advance of the pre-trial hearing, the parties appearing shall file

---

[\*In many cases time is saved if the parties also attend.]



with the Clerk a "Pre-Trial Stipulation," executed jointly, and containing:

[a] a "Stipulation of Facts" setting forth a detailed recital of all facts involved which are conceded by the parties;

[b] a "Schedule of Exhibits" comprising a list of all documents exhibited by each party at the meeting or meetings held pursuant to [2] above, with a description of each document sufficient for identification, and a statement of all admissions by and all issues between any of the parties as to the genuineness thereof, the due execution thereof, and the truth of relevant matters of fact set forth therein;

[c] a Statement of any objection reserved by any party to the admissibility of any fact covered by stipulation;

[d] a Statement limiting the effect of admissions of fact as provided by Rule 36(b) F.R.C.P., if desired by any party; and

[e] a Statement setting forth all alleged facts which any party is unable to concede but does not, as presently advised, intend to contest at the trial by evidence to the contrary.

[5] Not later than three days in advance of the pre-trial hearing, each party appearing shall serve and file with the Clerk a "Pre-Trial Statement of Issues" containing:

[a] a concise recital of all ultimate facts which such party contends remain at issue to be litigated upon the trial;

[b] a statement of each issue of law (including questions of evidence and procedure) expected to arise at the trial, as to which such party seeks a ruling of the Court, predicated upon either an agreed or an assumed state of facts, in advance of the trial;

[c] if the case be one in which the Court may award a reasonable sum to the prevailing party for attorneys' fees, the present estimate as to the maximum amount to be requested in the event such party prevails upon the trial;

[d] a statement of the position of such party with respect to all other matters referred to in Rule 16 F.R.C.P., which are deemed applicable to the case; and

[e] any other stipulations or suggestions for the assistance of the Court, including an estimate of counsel as to the probable duration of the trial. [28]

[6] At the pre-trial hearing each party shall present to the Court, to be marked for identification, all documents (other than those to be used for impeachment) intended to be offered at the trial by such party; and the Court will then consider:

[a] the stipulations, statements and memorandums filed pursuant to [3], [4] and [5] above;

[b] all documents relied upon by the respective parties;

[c] all matters referred to in Rule 16, F.R.C.P., which may be applicable to the case;

[d] all motions and other proceedings then pending under Rules 12, 33-37, or 56 F.R.C.P.;

[e] any other matters which may be presented relative to parties, process, pleading or proof, with a view to simplifying the issues and bringing about a just, speedy and inexpensive determination of the action.

[7] Upon conclusion of the pre-trial hearing, the Court will set the case for trial\* and enter such further orders as the status of the case may require.

[8] The memorandum of points and authorities required pursuant to [3] may be considered as compliance with local rule 12.

[9] All papers called for by this order shall be filed in duplicate and in the form required by local rule 4.

It Is Further Ordered that the Clerk this day serve this order by United States mail upon all parties appearing in the cause.

December 2, 1949.

/s/ WM. C. MATHES,

United States District Judge.

[Form Civ. 21]

[Mathes, J.]

[Rev. 5, 8/49.]

[Endorsed]: Filed December 2, 1949. [29]

---

[\*This case will not be called for setting pursuant to local rule 3.]

[Title of District Court and Cause.]

## PRE-TRIAL STIPULATION

### (A) Stipulation of Facts Conceded by the Parties

(1) All of the facts alleged in paragraphs 1, 2, 3 and 13 of the Amended Complaint for Injunction filed in this case are admitted; except that defendants deny that they were aware their activities are violative of the Act.

(2) All of defendants' products referred to in the Amended Complaint for Injunction are drugs and are shipped interstate by the defendants. An additional drug which defendants ship interstate is Cheno Phytolacca Berry Juice Extract Tablets, and it is agreed that the effect, if any, of this drug in weight reduction, when taken as directed in the label, is identical with the effect of Cheno Preparation of Phytolacca Berry Juice in weight reduction, when the latter drug is taken as directed in the label. See Government's Exhibit 20 for the labels of both products.

(3) The composition of each of the 10 products enumerated below is [30] the same in the present case as the composition of the same 10 products involved in the case of U. S. v. 12 Packages \* \* \* Alberty Food, etc., which originated in the U. S. District Court for the District of Columbia as District No. 2696 and was transferred for trial to the U. S. District Court for the Northern District of California, where it was assigned Docket No. 23457-W (See Government's Exhibit 36):



Alberty Food

Instant Alberty Food

Alberty's Vegetable Compound Capsules

Alberty's Ca-Mo Pellets

Alberty's Phosphate Pellets

Alberty's Lebara Pellets

Alberty's Laxative Blend

Cheno Herb Tea

Cheno Combination Tablets

Cheno Preparation of Phytolacca Berry Juice.

(4) Defendants ship all of their products in interstate commerce to health food retail outlets and intend to continue so shipping these products. Defendants also ship these products interstate direct to ultimate consumers in response to mail orders from such persons.

(5) The various items of literature referred to in paragraph 4 of the Amended Complaint represent and suggest that defendants' products are useful as specified in said paragraph, but defendants expressly object to the admissibility of such evidence except insofar as it relates to the booklets "Calcium—The Staff of Life" and "Happy Figures by the Cheno Plan—The 5-Factor Reducing Plan."

(6) The composition of each of defendants' products is as declared in the labels which comprise Government's Exhibits 1-29, inclusive, with the following qualifications:

(a) An amplified statement as to the quantitative formulae of some of these products is contained in Government's Exhibits 38-44, inclusive.



(b) The weight of an Alberty Vegetable Compound capsule [31] is 10 grains.

(c) The weight of an Alberty's Sabinol pellet is 1.1 grains.

(d) The weight of a Ri-Co tablet is 2.41 grains.

(e) The weight of a Lebara No. 2 pellet is 1.1 grains.

(7) During the past 25 years, the defendants have used literature similar to that identified as Government's Exhibits 29-35, and many other items of literature, in the promotion of the products involved in this case:

(a) Defendants have shipped their products and their literature interstate simultaneously from the same point of origin to the same retail outlet.

(b) Defendants have made separate interstate shipments of their products and their literature from the same point of origin to the same retail outlet.

(c) Defendants have made interstate shipments of their products from one State and of their literature from another State, both consigned to the same retail outlet.

(d) Defendants have made separate interstate shipments of their products and their literature from the same point of origin, the products being consigned to a retail outlet, and the literature being consigned to a mailing agency which in turn mailed the literature to persons whose names and addresses were fur-

nished such agency by the retail outlet and by the defendants.

(e) Defendants have made interstate shipments of their products from one State to a retail outlet, and interstate shipments of their literature from another State to a mailing agency which in turn mailed the literature to persons whose names and addresses were furnished such agency by the retail outlet and by the defendants.

(8) In promoting the interstate sale of the products here involved, defendants are currently using the literature which is identified as Government's Exhibits 30 and 35, though the Government reserves the right to introduce evidence regarding the defendants' current interstate use of the literature identified as Government's Exhibits 31-34, inclusive.

(9) Defendants are currently distributing interstate in the following [32] ways the literature identified as Government's Exhibits 30 and 35:

(a) Defendants obtain the names and addresses of prospective customers from the retail outlets to which they sell their products. Defendants mail said literature to said prospective customers, and on such literature defendants print the name and address of the retail outlet that furnished such names and addresses.

(b) Defendants also obtain the names and addresses of prospective customers from demonstrators who are hired by the defendants to work in retail outlets and there promote the

sale of defendants' products. Defendants mail the aforesaid literature to said prospective customers, and on such literature defendants print the name and address of a retail outlet located in the same area as the prospective customer.

(c) Defendants also obtain the names and addresses of prospective customers when individuals write in to the defendants for literature or to submit mail orders. Defendants mail the aforesaid literature to said prospective customers, and on such literature defendants print the name and address of a retail outlet located in the same area as the prospective customer.

(d) [The Government reserves the right to introduce evidence regarding other current methods of interstate distribution used by defendants.]

(10) Defendants utilize newspaper and magazine advertising in promoting the interstate sale of their products. In running such advertisements, it is defendants' practice to furnish their retail outlets with advertising mats. The retail outlets then arrange to have the advertisements appear in newspapers and magazines, and the defendants pay part or all of the costs of such advertisements as the case may be. The representations which the defendants make for their products in these advertisements are substantially the same as the representations which they make for their products in their literature.

(11) Defendants ship all of their products and literature from Hollywood, Calif.

## (B) Schedule of Exhibits

## Government's Exhibits—1-29, Inclusive—Labels

These Exhibits are the genuine labels of the products which [33] defendants are currently shipping interstate. These Exhibits are admissible in evidence without any objection.

## 30-35, Inclusive—Literature

These Exhibits are genuine examples of literature which defendants have shipped interstate. Defendants assert that they are currently shipping interstate the literature which comprises Government's Exhibits 30 and 35 only, but defendants deny that they are currently shipping interstate the literature which comprises Government's Exhibits 31-34, inclusive. Defendants object to the admission in evidence of Government's Exhibits 30-35, inclusive, on the ground that such literature is not "labeling" within the meaning of 21 U.S.C. 321(m). There is no objection to the admission of these Exhibits in evidence for the restricted purpose of showing the conditions for which defendants offer the products involved.

36—Certified Copy of Pleadings, Findings,  
Conclusions, and Orders in 1942 Trial

This Exhibit is genuine and has been duly executed. It may be admitted in evidence without any objection.

37—Certified Copy of Pleadings, Findings, Conclusions, Order, Opinion, and Notice of Appeal in  
1949 Trial



This Exhibit is genuine and has been duly executed. It may be admitted in evidence without any objection.

38-44, Inclusive—Quantitative Formulae

These formulae are genuine and they supplement the composition statements as declared on the labels of Government's Exhibits 2, 11, 21, 22, 23, 25, and 26;

Government's Exhibits 38-44, inclusive, each bears a reference to the particular Government Exhibit that contains the label of the product involved. Government's Exhibits 38-44, inclusive, may be admitted in evidence without any objection. [34]

45-132, Inclusive—Booklets, Leaflets,  
Advertisements, etc.

These Exhibits are genuine examples of literature and advertisements which defendants have used in the past. Defendants object to their being admitted in evidence.

ERNEST A. TOLIN,  
United States Attorney;

CLYDE C. DOWNING,  
Assistant U. S. Attorney,  
Chief, Civil Division;

/s/ MAX F. DEUTZ,  
Assistant U. S. Attorney,  
Attorneys for Plaintiff.

/s/ WILLIAM V. O'CONNOR,  
Attorney for Defendants.



It Is so Ordered this ... day of ....., 1950.

.....,

United States District Judge.

[Endorsed]: Filed February 15, 1950. [35]

---

[Title of District Court and Cause.]

### PRE-TRIAL STATMENT OF ISSUES AS STIPULATED

The parties to this proceeding are agreed that there remain only three ultimate issues in this case:

(1) Is the literature, which the defendants use in promoting the interstate sale of their drugs, "labeling" within the meaning of 21 U.S.C. 321(m) ?

(2) If this literature is "labeling," is this labeling false and misleading so as to cause the drugs which defendants sell to be misbranded within the meaning of 21 U.S.C. 352(a) ?

(3) Does the labeling of defendants' 29 articles of drug, which are involved in this case, fail to bear adequate directions for use, thereby causing said drugs to be misbranded within the meaning of 21 U.S.C. 352(f)(1) ?

The Pre-Trial Stipulation provides a sufficient factual basis for the [36] Court to determine the first and third issues without any additional evidence.

The Government contends that the Pre-Trial Stipulation provides sufficient factual basis for the Court to decide a portion of the second issue without further evidence. This contention is predicated upon the claim that the 1942 trial (Government's Exhibit 36) in res judicata here with respect to 10 of the drugs here involved. The defendants contend that res judicata is not applicable and assert that the therapeutic claims that were involved in the 1942 case are different from the therapeutic claims involved in the instant case. It is the Government's position that the therapeutic claims are essentially the same.

It is estimated that the trial of this case, with respect to the remaining portion of the second issue, will consume approximately six days.

Respectfully submitted,

ERNEST A. TOLIN,  
United States Attorney;

CLYDE C. DOWNING,  
Assistant U. S. Attorney,  
Chief, Civil Division;

/s/ MAX F. DEUTZ,  
Assistant U. S. Attorney,  
Attorneys for Plaintiff.

/s/ WILLIAM V. O'CONNOR,  
Attorney for Defendants.

[Endorsed]: Filed February 16, 1950. [37]

[Title of District Court and Cause.]

### MEMORANDUM TO COUNSEL

As to the questions of law with respect to which the parties seek a ruling in advance of trial pursuant to paragraph 5(b) of the "Order for Pre-trial Proceedings" herein, the court will rule upon the trial, in the absence of controlling precedent to the contrary:

(1) that Exhibit 30 [See paragraph 8 of Pre-trial Stipulation filed February 15, 1950], which distributed by the means, in the manner and for the purposes described in paragraph 9 of the pre-trial stipulation filed February 15, 1950, cannot be considered as "accompanying" [21 U.S.C. § 321(m) (2)], in "interstate commerce" [21 U.S.C. §§ 331(a), 321(b)], any "drug" [21 U.S.C. § 321(g)] prescribed, recommended or suggested in the exhibit as being "intended for use in the diagnosis, cure, mitigation, treatment, or prevention of [38] disease in man or other animals" [21 U.S.C. § 321(g) (2)], or "intended to affect the structure or any function of the body of man or other animals" [21 U.S.C. § 321(g) (3)]; and the exhibit does not therefore comprise a portion of the "labeling" of any such drug within the meaning of 21 U.S.C. § 321(m) [See 21 U.S.C. § 321(k), (1); cf. *Kordell v. United States*, 335 U. S. 345, 346, 348 (1948); *Urbuteit v. United States*, 335 U. S. 355, 357-358 (1948)];

(2) that Exhibit 35 [See paragraph 8 of the Pre-trial Stipulation filed February 15, 1950], when

distributed by the means, in the manner and for the purpose described in paragraph 9 of the pre-trial stipulation filed February 15, 1950, cannot be considered as “accompanying” [21 U.S.C. § 321(m) (2)], in “interstate commerce” [21 U.S.C. §§ 331 (a), 321(b)], any “drug” [21 U.S.C. § 321(g)] prescribed, recommended or suggested in the exhibit as being “intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals” [21 U.S.C. § 321(g) (2)], or “intended to affect the structure or any function of the body of man or other animals” [21 U.S.C. § 321(g) (3)]; and the exhibit does not therefore comprise a portion of the “labeling” of any such drug within the meaning of 21 U.S.C. § 321(m) [See 21 U.S.C. § 321(k), (1); cf. *Kordell v. United States*, 335 U. S. 345, 346-348 (1948); *Urbuteit v. United States*, 335 U. S. 335, 357-358 (1948)];

(3) that the “labeling” [21 U.S.C. § 321(m) (1)]—which appears to comprise only the “labels” [21 U.S.C. § 321(k), (1); Exhibits 1 to 29 inclusive]—of the 29 “drugs” [21 U.S.C. § 321(g); paragraph 2 of Pre-trial Stipulation filed February 15, 1950] involved in this action, does not bear “adequate directions for use” within the meaning of 21 U.S.C. § 352(f) (1), in that such “labeling” as to each [39] “drug” fails to reveal the dosage or the frequency or duration of taking prescribed, recommended or suggested in connection with the diseases or conditions of the body for which such drug is held out to the public [See U.S.C. §§ 352



(j), 321(n), 371(a), 352(f); 21 Code Fed. Regs. § 1.106 (1949); *Colgrove v. United States*, 176 F.2d 614, 616 (9th Cir. 1949); *United States v. Various Quantities \* \* \** “Instant Alberty Food,” 83 F. Supp. 882, 885 (D.C.D.C. 1949)]; and each such “drug” must therefore be held to be “misbranded” within the meaning of 21 U.S.C. § 352(f) (1).

A ruling on the issue of *res judicata* as to the ten drugs involved in this action which were the subject of seizure and condemnation in the United States District Court for the Northern District of California in case No. 23457-W, entitled “*United States v. 12 Packages \* \* \* Alberty Food, etc.*” [See Exhibit 36; paragraph 3 of Pre-trial Stipulation filed February 15, 1950], will be deferred, in view of counsel’s assurance [See Defts.’ Memorandum of Law filed February 17, 1950, p. 6, lines 1-14] that the claims now asserted by defendants for the ten drugs in question are “different therapeutic claims \* \* \* from those asserted and maintained when these articles were manufactured and distributed in 1942” [cf. *George H. Lee Co. v. United States*, 41 F.2d 460, 462 (9th Cir. 1930)].

It Is Ordered that the Clerk this day serve copies of this memorandum by United States mail on the attorneys for the parties appearing in this cause.

July 13, 1950.

/s/ WM. C. MATHES,

United States District Judge.

[Endorsed]: Filed July 13, 1950. [40]



[Title of District Court and Cause.]

**MOTION FOR SUMMARY JUDGMENT  
AND NOTICE OF MOTION**

**Motion for Summary Judgment**

Comes Now the plaintiff United States of America by and through its attorneys, Ernest A. Tolin, United States Attorney for the Southern District of California; Clyde C. Downing and Max F. Deutz, Assistant United States Attorneys, and moves the court that it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in its favor granting an injunction against the defendants herein as prayed for in the Amended Complaint on the following grounds and for the following reasons:

**I.**

That in its Memorandum to Counsel dated July 13, 1950, this Court has ruled that the labeling of the 29 drugs involved in this cause, as represented by Exhibits 1 to 29, inclusive, does not bear "adequate directions for use" within the meaning of 21 U.S.C. § 352(f) (1), in that such "labeling" as to each "drug" fails to reveal the dosage or the frequency or duration of taking prescribed, [41] recommended or suggested in connection with the diseases or conditions of the body for which such drug is held out to the public; and that each such "drug" is therefore "misbranded" within the meaning of 21 U.S.C. § 352(f) (1).

## II.

That there are no facts in dispute with respect to that portion of the Amended Complaint which seeks an injunction under 21 U.S.C. § 332(a) to restrain defendants from violating 21 U.S.C. § 331 (a) through the continued interstate shipment of drugs that are misbranded in violation of 21 U.S.C. § 352(f) (1).

## III.

That in view of this Court's rulings of July 13, 1950, it appears that the United States is entitled to judgment as a matter of law and that therefore further trial of this case would be futile.

This motion is based and will be presented upon the records and files herein, all of the pleadings and admissions filed by the respective parties hereto, including the Pre-trial Stipulation, the Exhibits admitted in evidence, the Affidavit of Ada J. Alberty, in response to the Interrogatories of the plaintiff, upon the Memorandum to Counsel, and upon the Memorandum of Points and Authorities attached hereto.

Dated July 19th, 1950.

ERNEST A. TOLIN,

United States Attorney;

CLYDE C. DOWNING,

Assistant U. S. Attorney,

Chief, Civil Division;

/s/ MAX F. DEUTZ,

Assistant U. S. Attorney;

Attorneys for Plaintiff.

Notice of Motion for Summary Judgment

To Alberty Food Products, Ada J. Alberty, Harry Alberty, Florence Alberty, Margaret Quinn, Helen Hackworth, and to William V. O'Connor, Their Attorney:

You and Each of You, will please take notice that the plaintiff, the United States of America, by and through the undersigned, will bring the above and foregoing motion on for hearing before the above-entitled court in the courtroom of the Honorable Wm. C. Mathes, United States District Judge, in the United States Post Office and Court House Building, Los Angeles, California, on Monday, the 31st day of July, 1950, at the hour of 10 o'clock, a.m., on that day or as soon thereafter as counsel can be heard.

Dated at Los Angeles, California, this 19th day of July, 1950.

ERNEST A. TOLIN,  
United States Attorney;

CLYDE C. DOWNING,  
Assistant U. S. Attorney,  
Chief, Civil Division;

/s/ MAX F. DEUTZ,  
Assistant U. S. Attorney,  
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed July 19, 1950. [43]

[Title of District Court and Cause.]

STATEMENT OF FACTS THAT ARE MATERIAL AND EXIST WITHOUT CONTROVERSY

Comes Now the plaintiff United States of America by and through its attorneys, Ernest A. Tolin, United States Attorney for the Southern District of California; Clyde C. Downing and Max F. Deutz, Assistant United States Attorneys, and files a statement of the facts that are material and exist without substantial controversy, pursuant to Local Rule 3(d) (2) and in support of its Motion for Summary Judgment:

(1) All of the products in this cause are drugs and are shipped interstate by the defendants. [Pre-Trial Stipulation, page 1, lines 24-25, and page 2, lines 21-26.]

(2) The "labels" of these drugs are before the Court by stipulation at the Pre-Trial hearing. [Plaintiff's Exhibits 1-29.]

(3) Under the Court's ruling of July 13, 1950, the "labeling" of defendants' drugs consists only of the "labels" identified as Plaintiff's Exhibits 1-29. [47]

(4) Said "labeling," on its face, shows a failure to state the diseases and conditions of the body for

which said drugs are offered to the public by the defendants.

Dated July 19th, 1950.

Respectfully submitted,

ERNEST A. TOLIN,  
United States Attorney;

CLYDE C. DOWNING,  
Assistant U. S. Attorney,  
Chief, Civil Division;

/s/ MAX F. DEUTZ,  
Assistant U. S. Attorney,  
Attorneys for Plaintiff.

Copy received.

[Endorsed]: Filed July 19, 1950. [48]

---

[Title of District Court and Cause.]

### SUPPLEMENTAL STIPULATION

It Is Hereby Stipulated by and between all of the parties to this proceeding, through their respective attorneys, that, for the purposes of the pending Motion for Summary Judgment only, Government's Exhibits 1 through 35, inclusive, comprise all of the literature and labels relevant to this case; the use



of said literature and labels by the defendants being as described in the Pre-Trial Stipulation.

ERNEST A. TOLIN,  
United States Attorney;

CLYDE C. DOWNING,  
Assistant U. S. Attorney,  
Chief, Civil Division;

/s/ MAX F. DEUTZ,  
Assistant U. S. Attorney,  
Attorneys for Plaintiff.

/s/ WILLIAM V. O'CONNOR,  
Attorney for Defendants.

[Endorsed]: Filed September 8, 1950. [50]

---

[Title of District Court and Cause.]

NOTICE OF HEARING OF MOTION  
FOR SUMMARY JUDGMENT

To Alberty Food Products, a Partnership, and to  
O'Connor & O'Connor, 530 West 6th Street,  
Los Angeles 14, California, Their Attorneys:

You, and each of you, will please take notice that the hearing on the Motion for Summary Judgment, heretofore called on the calendar of the Honorable William C. Mathes, in the United States Post Office & Court House, Los Angeles, California, at 2:00 p.m., on February 5, 1951, has been continued for hearing in the same Court on Monday, March 5, 1951, at the hour of 2:00 p.m., or as soon thereafter

as counsel can be heard, and that the Court by an oral order of February 5, 1951, has instructed counsel to be present at that time.

Dated February 8th, 1951.

ERNEST A. TOLIN,  
United States Attorney;

CLYDE C. DOWNING,  
Assistant U. S. Attorney,  
Chief, Civil Division;

/s/ MAX F. DEUTZ,  
Assistant U. S. Attorney,  
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 8, 1951. [51]

---

[Title of District Court and Cause]

### MEMORANDUM OF DECISION

The Government invokes the jurisdiction of this Court under § 302(a) of the Federal Food, Drug and Cosmetic Act [52 Stat. 1043, 21 U.S.C. § 332(a)] to enjoin alleged violations by defendants of § 301 which prohibits “introduction . . . into interstate commerce of any . . . drug . . . that is . . . misbranded” [21 U.S.C. § 331(a)]. [53]

The amended complaint for injunction alleges inter alia:

That defendants are “the manufacturers,

packers and distributors of certain articles of drug . . .”;

That “For some years, defendants have introduced said articles of . . . drug into interstate commerce, and have caused said articles to be accompanied by various leaflets and booklets when introduced into and while in interstate commerce and while held for sale after shipment in interstate commerce. Said leaflets and booklets are entitled ‘Calcium, The Staff of Life’ [Exhibit 30]; ‘Dynamic Digests’ [Exhibit 31]; ‘Is There Hope That Graying Hair Can Be Restored? Read What Science Says—Pandora’ [Exhibit 32]; ‘Health Mysteries’ [Exhibit 33]; ‘Reduce! Streamline Your Figure—Follow the 5 Factor Cheno Plan’ [Exhibit 34]; ‘Happy Figures by the Cheno Plan’ [Exhibit 35]. Each of these booklets and leaflets relates to one or more of the above-mentioned articles of drug . . .”;

That “At all times, the aforesaid articles of drug, when introduced into interstate commerce, have been and are now misbranded within the meaning of [54] section 502(f) (1) of the Act [21 U.S.C. § 352(f) (1)], in that their labelings fail to bear adequate directions for use for the purposes and conditions for which they are intended.”

At pre-trial hearing the parties stipulated:

(1) That “defendants’ products referred to in the Amended Complaint for Injunction are drugs and are shipped interstate by the defendants.”

(2) That “Defendants ship all of their products in interstate commerce to health food retail outlets and intend to continue so shipping these products. Defendants also ship these products interstate direct to ultimate consumers in response to mail orders from such persons.”

(3) That “Defendants are currently distributing [the above-mentioned literature] interstate in the following ways . . . :

“(a) Defendants obtain the names and addresses of prospective customers from the retail outlets to which they sell their products. Defendants mail said literature to said prospective customers, and on such literature defendants print the name and address of the retail outlet that furnished such names and addresses. [55]

“(b) Defendants also obtain the names and addresses of prospective customers from demonstrators who are hired by the defendants to work in retail outlets and there promote the sale of defendants’ products. Defendants mail the aforesaid literature to said prospective customers, and on such literature defendants print the name and address of a retail outlet located in the same area as the prospective customer.

“(c) Defendants also obtain the names and addresses of prospective customers when individuals write in to the defendants for Literature or to submit mail orders. Defendants mail the aforesaid literature to said prospective cus-

tomers, and on such literature defendants print the name and address of a retail outlet located in the same area as the prospective customer.”

Section 201 of the Act provides in part that:

“(a) The term ‘label’ means a display of written, printed, or graphic matter upon the immediate container of any article; and a requirement . . . that any word, statement, or other information appear on the label shall not be [56] considered to be complied with unless such word, statement, or other information also appears on the outside container or wrapper, if any there be, of the retail package of such article, or is easily legible through the outside container or wrapper.

\* \* \*

“(1) The term ‘immediate container’ does not include package liners.

“(m) The term ‘labeling’ means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers, or wrappers, or (2) accompanying such article.”

The parties have stipulated to the identity and content of the label used “upon the immediate container” of each article, and further that such “label” [21 U.S.C. § 321(k), (1)] constitutes the entire “labeling” [21 U.S.C. § 321(m)] as to each article, unless the above-mentioned “literature” is to be considered as “accompanying such article” in interstate commerce within the meaning of



§ 201(m) (2) of the Act [21 U. S. C. § 321(m) (2)].

Based upon the facts established by the pleadings and the pre-trial stipulations, the Government has moved for summary judgment upon the ground: "That there are no facts [57] in dispute with respect to that portion of the Amended Complaint which seeks an injunction under 21 U.S.C. § 332(a) to restrain defendants from violating 21 U.S.C. § 331(a) through the continued interstate shipment of drugs that are misbranded in violation of 21 U.S.C. § 352(f) (1)," which provides that: "A drug . . . shall be deemed to be misbranded . . . (f) unless its labeling bears (1) adequate directions for use. . . ."

In order to determine whether the labeling as to any "drug" [21 U.S.C. § 321(g)] bears "adequate directions for use" within the meaning of the Act it is necessary of course first to ascertain what comprises "its labeling." Section 201(m) declares that: "The term 'labeling' means all labels [see 21 U.S.C. § 321(k), (1)] and other written, printed or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article" [21 U.S.C. § 321(m)].

In *Kordel v. United States*, 335 U.S. 345, 347, 348 (1948), where "the literature involved . . . was shipped separately from the drugs and at different times" but "had a common origin and a common destination," the literature was held to accompany the drugs in interstate commerce within the meaning of the Act [21 U.S.C. § 321(m)] and so to com-

prise [58] a part of the "labeling." [See also *United States v. Urbuteit*, 335 U.S. 355 (1948); *United States v. Research Laboratories, Inc.*, 126 F. 2d 42, 45 (9th Cir. 1942).]

As in the cases just cited, the literature involved at bar explains the claimed beneficial uses of each drug and was obviously "designed for use in the distribution and sale"; while the "label" itself is either totally or practically silent as to the purpose for which the drug is to be used; and usually, but not invariably, both the drug and the literature describing it have a common point of origin in interstate commerce. The point of difference in the case at bar is that generally speaking the article and the literature do not have a common destination, since defendants usually ship the drugs to a retail outlet, while the literature is shipped directly to prospective consumers.

Thus the precise question on this phase of the case is whether the literature may properly be held to accompany the drug in interstate commerce within the meaning of 21 U.S.C. § 321(m) (2), where the destination of the literature when shipped is not the distributor or consumer of the drug.

The policy of the Act seems clearly to require that "labeling" [21 U.S.C. § 321(m)] which bears "adequate directions for use" [21 U.S.C. § 352(f) (1)] of the drug be placed "upon the immediate container" [21 U.S.C. § 321(k), (1)], or [59] accompany the container so closely that the ordinary consumer will be apprised of all directions, cautions and other information appearing thereon.

Section 201(k) provides that “a requirement . . . that any word, statement or other information appear on the label shall not be considered to be complied with unless such word, statement, or other information also appears on the outside container or wrapper, if any there be, of the retail package of such article, or is easily legible through the outside container or wrapper” [21 U.S.C. § 321(k)].

Section 201(n) provides that: “If an article is alleged to be misbranded because the labeling is misleading, then in determining whether the labeling is misleading there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, or any combination thereof, but also the extent to which the labeling fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the article to which the labeling relates under the conditions of use prescribed in the labeling thereof or under such conditions of use as are customary or usual” [21 U.S.C. § 321(n)]. [60]

And § 502 declares that: “A drug or device shall be deemed to be misbranded——

“(a) If its labeling is false or misleading in any particular. \* \* \*

“(c) If any word, statement, or other information required . . . to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or devices, in the labeling) and in such terms as to render it

likely to be read and understood by the ordinary individual under customary conditions of purchase and use. \* \* \*

“(f) Unless its labeling bears (1) adequate directions for use; and (2) such adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application, in such manner and form, as are necessary for the protection of users: \* \* \*

“(j) If it is dangerous to health when used in the dosage, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof.” [21 U.S.C. § 352(a), (c), (f), (j).] [61]

Nothing more than a reading together of these quoted provisions of the Act is required to demonstrate the emphasis placed by the Congress upon the contents of the labeling as a means of protecting the consumer, as well as the legislative intent that the labeling so closely accompany the drug into the hands of the consumer “as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use” [21 U.S.C. § 352(c); see *Alberty Food Products v. United States*, 185 F.2d 321 (9th Cir. 1950)].

Where, as here, the literature and drugs do not have a common destination and the literature is not shipped to either a distributor or a consumer of the drug, it would be in derogation of the policy and



purposes of the Act to broaden further the content of the verb “accompany” as employed in § 201(m) (2), 21 U.S.C. § 321(m) (2). [ See *United States v. Dotterweich*, 320 U.S. 277, 280 (1943).] So it is my opinion that the scope of “accompanying” should be limited under *Kordel v. United States*, *supra*, 335 U.S. 345 and *United States v. Urbuteit*, *supra*, 335 U.S. 355, to cases where the literature has the same destination as the drug and hence will likely reach the hands of the consumer to serve the purposes for which labeling is intended. [Cf. *Alberty v. [62] United States*, 159 F. 2d 278 (9th Cir. 1947); also *Alberty Food Products v. United States*, *supra*, 185 F. 2d at 325.]

It follows that in the case at bar the literature must be held as not “accompanying” the drugs in interstate commerce and therefore as not constituting a part of the “labeling.” [21 U. S. C. § 321(m) (2).] The “labels” alone then on each of the drugs in question [21 U.S.C. § 321(k)] must be held to comprise the entire “labeling” as to such drug.

There remains the question whether the “labeling” bears “adequate directions for use” within the meaning of § 502(f) (1) of the Act [21 U.S.C. § 352(f) (1)].

Labeling fails to bear “adequate directions for use,” if it does not state “the purpose or condition for which the drug was intended,” as well as the dosage and frequency or duration of taking prescribed, recommended or suggested in connection with the diseases or conditions of the body for which such drug is held out to the public. [See 21 U.S.C.



§§ 321(n), 352(f), 352(j), 371(a); 21 Code Fed. Regs. § 1.106 (1949); *Colegrove v. United States*, 176 F. 2d 614, 616 (9th Cir. 1949); *United States v. Various Quantities . . . "Instant Alberty Food,"* 83 F. Supp. 882, 885 (S.D. Cal. 1949).]

As Judge Bone said in *Alberty Food Products v. United States*, *supra*, 185 F.2d at 325: [63]

“We proceed upon the assumption that the ‘adequate directions for use’ mandate of Sec. 352(f) (1) requires that all who might want to use a drug . . . are at least entitled to a chance to somewhere find and examine a ‘label’ which is complete enough to . . . provide sufficient information at the time of purchase upon which intelligent determination might be made as to whether the drug is one which is prescribed, recommended, or suggested for their particular . . . ailment. We are persuaded that the law requires this much.”

The following is typical of the “labeling” of a majority of the drugs in the case at bar:

“Alberty’s  
Sabinol  
Homeopathic  
App. 525 Pellets  
Each Pellet Contains  
Berberis Vulgaris  
Lycopodium  
Manufactured for and Packed by  
Alberty Food Products  
Hollywood, California

Directions:

Take 3 Pellets every 2 hours until relieved. Then 4 times daily."

Similar labels appear on defendants' products identified as:

Alberty's Vegetable Compound Capsules [Exhibit 1]; [64]

Alberty's Oxorin [Exhibit 2];

Alberty's Food Regular [Exhibit 3];

Instant Alberty Food [Exhibit 4];

Alberty Garlic Perles (Alberty Garlic and Vegetable Oil Perles) [Exhibit 5];

Alberty's Sabinol [Exhibit 6];

Alberty Phloxo B Tablets [Exhibit 7];

Alberty's Phosphate Pellets [Exhibit 8];

Alberty's Ri-Co Tablets [Exhibit 10];

Alberty Special Formula Tablets [Exhibit 11];

Wheat Germ Oil [Exhibit 14];

Alberty's Lebara Pellets, Plain [Exhibit 17];

Alberty's Lebara No. 2 Pellets [Exhibit 18];

Cheno Phytolacca Berry Juice Extract Tablets and Cheno Phytolacca Berry Juice [Exhibit 20];

Cheno Combination Tablets [Exhibit 21];

Pandora Tablets [Exhibit 22];

Recal Tablets [Exhibit 23]; and

Alberty's Ca-Mo Pellets [Exhibit 27].

Such "labeling" fails to state either "the purpose or condition for which the drug was intended" or the duration of taking recommended for treatment of the diseases or conditions of the body for which

the drug is held out to the public [65] in defendants' literature.

The remaining "drugs" involved at bar, to wit:

Alberty Riol Tablets [Exhibit 9];

Alberty's Vitamin A (High Potency) Shark Liver Oil [Exhibit 12];

Alberty's Vi-C [Exhibit 13];

Alberty Vitamin B Complex Tablets with High-Potency B<sup>1</sup> [Exhibit 15];

Alberty's Vitamin B<sup>1</sup> Tablets with Supplementary Amounts of Other B-Complex Factors [Exhibit 16];

Cheno Herb Tea [Exhibit 19];

Alberty's Vio-Min Vitamin-Mineral Tablets [Exhibit 24];

Alberty R-Gon Tablets [Exhibit 25];

Alberty's Laxative Blend Tea [Exhibit 26];

Alberty's Vitamin A & G Capsules [Exhibit 28]; and

Alberty Rego [Exhibit 29].

may be classed as so-called dietary supplements and laxatives. As such "the purpose or condition for which the drug was intended" is a matter of common knowledge.

However defendants in their literature admittedly recommend these "drugs" without exception for other than commonly known uses. For example, defendants recommend their Vitamin [66] B<sup>1</sup> Tablets [Exhibit 16] in the pamphlet "Calcium—The Staff of Life" [Exhibit 30] for "preventing chronic ill health"; for "certain cases of heart disease" and "some cases of arthritis and neuritis"; for increas-

ing “the body’s insulin output and sugar tolerance”; and for “improving the intelligence of school children.”

Yet the only directions for use appearing on the “labeling” of Alberty’s Vitamin B<sup>1</sup> Tablets are: “Directions—Two Tablets, three times daily (six tablets a day) furnish 3½ times the minimum daily requirements of Vitamin B<sup>1</sup> for an adult, and 1/10 such requirements of Vitamin B<sup>2</sup>.

Comment on the manifest inadequacy of such labeling to give “adequate directions for use” for the purposes recommended in defendants’ literature would be surplusage indeed.

The facts as to the “labeling” of each “drug” at bar being admitted, the Government is entitled to summary judgment for a writ of injunction permanently enjoining and restraining defendants from “the introduction or delivery for introduction into interstate commerce” [21 U.S.C. § 331(a)] of any of the “drugs” involved in this action unless and until the labeling [67] of each such “drug” bears adequate directions for the use thereof in the treatment of the diseases and conditions of the body for which defendants in their literature and other advertising prescribe, recommend or suggest its use [Colegrove v. United States, *supra*, 176 F. 2d 614; *id.*, 83 F. Supp. 880 (S.D. Cal. 1947).]

Accordingly the Government’s motion for summary judgment is granted, and the United States Attorney will submit proposed findings of fact, con-

clusions of law and judgment pursuant to local rule 7 within ten days.

June 8, 1951.

/s/ WM. C. MATHES,

United States District Judge.

[Endorsed]: Filed June 8, 1951.

---

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF  
LAW ON APPLICATION FOR PERMA-  
NENT INJUNCTION

Plaintiff having filed a Complaint and an Amended Complaint praying for a permanent injunction, and the defendants having appeared and answered, and the Court having conducted pre-trial proceedings, and the parties having filed a Pre-Trial Stipulation, and the Court having handed down a Memorandum to Counsel, and the plaintiff having filed a Motion for Summary Judgment, and the Court having considered oral argument and briefs, and handed down its Memorandum of Decision, the Court now makes the following Findings of Fact and Conclusions of Law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure:

Findings of Fact

(1) The defendant, Alberty Food Products, is a partnership having its principal place of business



at 729 N. Seward Street, Hollywood, California. The partnership also trades and does business under the name of Cheno Products. The defendants, Ada J. Alberty, Harry Alberty, Florence Alberty, Margaret Quinn, and Helen Hackworth, are residents of the County of Los Angeles, State of California, and are primarily responsible for the policies and activities [69] of the partnership.

(2) Said defendants manufacture, pack, and distribute in interstate commerce certain products designated by name as follows: Alberty's Vegetable Compound Capsules; Alberty's Oxorin; Alberty's Food Regular; Instant Alberty Food; Alberty Garlic Perles (Alberty Garlic and Vegetable Oil Perles); Alberty's Sabinol; Alberty Phloxo B Tablets; Alberty's Phosphate Pellets; Alberty Riol Tablets; Rico Tablets; Alberty Special Formula Tablets; Alberty's Vitamin A (High Potency) Shark Liver Oil; Alberty's Vi-C; Wheat Germ Oil; Alberty Vitamin B Complex Tablets with High-Potency B<sub>1</sub>; Alberty's Vitamin B<sub>1</sub> with Supplementary Amounts of Other B Complex Factors; Alberty's Lebara Pellets, Plain; Alberty's Lebara Pellets, No. 2; Cheno Herb Tea; Cheno Phytolacca Berry Juice; Cheno Phytolacca Berry Juice Extract Tablets; Cheno Combination Tablets; Tablets Pandora; Recal Tablets; Alberty's Vio-Min Vitamin-Mineral Tablets; Alberty R-Gon Tablets; Alberty's Laxative Blend; Alberty's Ca-Mo Pellets; Alberty's Vitamin A and G Perles (or Capsules); Rego.

(3) Each of said products is intended for use in

the treatment, cure, mitigation, or prevention of disease in man, or is intended to affect the structure or a function of the body of man.

(4) The labels affixed to the containers of each of said drugs appear in Plaintiff's Exhibits 1-29 inclusive, which are part of the Record before the Court pursuant to the Pre-Trial Stipulation and oral stipulation at the pre-trial hearing. Said labels comprise all of the labeling of said drugs.

(5) Defendants also ship in interstate commerce collateral promotional literature relating to said drugs. Specimens of such literature appear in Plaintiff's Exhibits 30-35, which are part of the Record before the Court in the same manner as Plaintiff's Exhibits 1-29 (referred to in the preceding Finding).

(6) Defendants have used a number of different methods in their interstate distribution of promotional literature. Currently, they obtain the names and addresses of prospective customers from retail outlets to which [70] they sell the aforesaid drugs; defendants then mail said literature to such persons, and on the literature defendants print the name and address of the retail outlet that furnished such names and addresses (of prospective customers).

(7) Defendants also obtain the names and addresses of prospective customers from demonstrators who are hired by the defendants to work in retail outlets and there promote the sale of defendants'

products. Defendants mail the aforesaid literature to said prospective customers, and on such literature defendants print the name and address of a retail outlet located in the same area as the prospective customer.

(8) Defendants also obtain the names and addresses of prospective customers when individuals write in to the defendants for literature or to submit mail orders. Defendants mail the aforesaid literature to said prospective customers, and on such literature defendants print the name and address of a retail outlet located in the same area as the prospective customer.

(9) The aforesaid collateral literature, Plaintiff's Exhibits 30-35, makes therapeutic claims for said drugs in specific disease conditions and makes further claims regarding the alleged efficacy of said drugs in affecting the structures and functions of the body, as set forth in paragraph 4 of the Amended Complaint and as admitted in paragraph (5) of the Pre-Trial Stipulation.

(10) Defendants also utilize newspaper and magazine advertising in promoting the interstate sale of said drugs. In said advertising, as admitted in paragraph (10) of the Pre-Trial Stipulation, defendants make representations for said drugs which are substantially the same as the representations they make in their collateral literature (Exhibits 30-35).

(11) The labeling of each of said drugs does not bear adequate directions for use since (1) it does not

enumerate the disease conditions for which the drugs are intended and offered to the public, (2) it does not specify the structures or functions of the body which it is intended to affect and for which it is offered to the public, and (3) it does not state the dosage and frequency and duration of administration in the treatment or prevention of each of such conditions, or for affecting such structures or functions of the body. [71]

(12) There is no genuine issue as to any material fact that remains unresolved with respect to the question whether said drugs are misbranded within the meaning of the Federal Food, Drug, and Cosmetic Act.

(13) Said defendants will continue to introduce their drugs into interstate commerce with labeling that does not bear adequate directions for use unless they are restrained by this Court.

### Conclusions of Law

(1) This Court has jurisdiction over the subject matter in this case and over the parties thereto, pursuant to 21 U.S.C. 332(a).

(2) Where drugs and related literature do not have a common destination, the literature does not "accompany" the drugs and hence is not "labeling" within the meaning of 21 U.S.C. 321(m). Plaintiff's Exhibits 1-29 are "labeling" within the meaning of 21 U.S.C. 321(m), but plaintiff's Exhibits 30-35 are not "labeling" within the meaning of said provision.



(3) In determining the disease conditions or other uses for which drugs are intended and offered to the public, the Court is not restricted to representations and suggestions in the “labeling” of such drugs, but should look to collateral literature, newspaper and magazine advertising, and any other medium of communication used by the manufacturer, packer, or distributor of such drugs.

(4) Under 21 U.S.C. 352(f)(1), a drug is misbranded and its labeling fails to bear “adequate directions for use” unless, among other things, the labeling (1) enumerates all of the disease conditions for which the drug is intended and offered to the public, (2) specifies the structures or functions of the body which it is intended to affect and for which it is offered to the public, and (3) declares the dosage and frequency and duration of administration for the treatment or prevention of such conditions, or for affecting such structures or functions of the body.

(5) Defendants’ products are drugs within the meaning of 21 U.S.C. 321(g)(2) or (3). [72]

(6) Defendants’ drugs are misbranded within the meaning of 21 U.S.C. 352(f)(1).

(7) Plaintiff’s Motion for Summary Judgment and prayer for an injunction should be granted permanently restraining all of the defendants from introducing or causing to be introduced into interstate commerce, and from delivering or causing to be delivered for introduction into interstate commerce,



in violation of 21 U.S.C. 331(a), any of the drugs listed above in Finding Number (2) or any other drug which is misbranded within the meaning of 21 U.S.C. 352(f)(1) by reason of the failure of its labeling (1) to enumerate the disease conditions for which such drug is intended and offered to the public, (2) to specify the structures or functions of the body which it is intended to affect and for which it is offered to the public, and (3) to state the dosage and frequency and duration of administration of such drug for the treatment or prevention of such conditions, or for affecting such structures or functions of the body.

(8) Plaintiff is entitled to all costs properly taxable against the defendants.

Dated this 30th day of June, 1951.

/s/ WM. C. MATHES,

United States District Judge.

The foregoing Findings of Fact and Conclusions of Law are hereby approved as to form.

Dated:

.....,

Edward J. O'Connor,

Attorney for Defendants.

Received copy of the within Findings of Fact and Conclusions of Law this 18th day of June, 1951.

/s/ EDWARD J. O'CONNOR,

Attorney for Defendants.

[Endorsed]: Filed July 2, 1951. [73]

[Title of District Court and Cause.]

## ORDER GRANTING PERMANENT INJUNCTION

Plaintiff having filed a Complaint and an Amended Complaint praying for a permanent injunction, and the defendants having appeared and answered, and the Court having conducted pre-trial proceedings, and the parties having filed a Pre-Trial Stipulation, and the Court having handed down a Memorandum to Counsel, and the plaintiff having filed a Motion for Summary Judgment, and the Court having considered oral argument and briefs, and handed down its Memorandum of Decision, and the Court having filed Findings of Fact and Conclusions of Law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure,

It Is Therefore Ordered, that plaintiff's Motion for Summary Judgment and prayer for a permanent injunction be, and hereby are granted, and that the defendants, Alberty Food Products, Ada J. Alberty, Harry Alberty, Florence Alberty, Margaret Quinn, and Helen Hackworth, and the agents, servants, employees, and attorneys of all or any one of them, and all other persons in active concert or participation with all or any of them, be and they hereby are permanently enjoined [74] and restrained from introducing or delivering for introduction into interstate commerce, and from causing the introduction or delivery for introduction into interstate commerce, directly or indirectly in any form or manner,

in violation of 21 U.S.C. 331(a), any of the following drugs,

Alberty's Vegetable Compound Capsules

Alberty's Oxorin

Alberty's Food Regular

Instant Alberty Food

Alberty Garlic Perles (Alberty Garlic and Vegetable Oil Perles)

Alberty's Sabinol

Alberty Phloxo B Tablets

Alberty's Phosphate Pellets

Alberty Riol Tablets

Rico Tablets

Alberty Special Formula Tablets

Alberty's Vitamin A (High Potency) Shark Liver Oil

Alberty's Vi-C

Wheat Germ Oil

Alberty Vitamin B Complex Tablets with High-Potency B<sub>1</sub>

Alberty's Vitamin B<sub>1</sub> with Supplementary Amounts of Other B Complex Factors

Alberty's Lebara Pellets, Plain

Alberty's Lebara Pellets, No. 2

Cheno Herb Tea

Cheno Phytolacca Berry Juice

Cheno Phytolacca Berry Juice Extract Tablets

Cheno Combination Tablets

Tablets Pandora

Recal Tablets

Alberty's Vio-Min Vitamin-Mineral Tablets [75]

Alberty R-Gon Tablets

Alberty's Laxative Blend

Alberty's Ca-Mo Pellets

Alberty's Vitamin A and G Perles (Or Capsules)

Rego

or any other drug which is misbranded within the meaning of 21 U.S.C. 352(f)(1), by reason of the failure of its labeling (1) to enumerate the disease conditions for which such drug is intended and offered to the public, (2) to specify the structures or functions of the body which it is intended to affect and for which it is offered to the public, and (3) to state the dosage and frequency and duration of administration of such drug for the treatment or prevention of such conditions, or for affecting such structures or functions of the body.

It Is Further Ordered, that a Writ of Injunction issue accordingly.

Dated, this 30th day of June, 1951.

/s/ WM. C. MATHES,

United States District Judge.

Costs taxed at \$49.88.

The Foregoing Order Granting Permanent Injunction is hereby approved as to form.

Dated:

.....,

Edward J. O'Connor,

Attorney for Defendants.

in violation of 21 U.S.C. 331(a), any of the following drugs,

Alberty's Vegetable Compound Capsules

Alberty's Oxorin

Alberty's Food Regular

Instant Alberty Food

Alberty Garlic Perles (Alberty Garlic and Vegetable Oil Perles)

Alberty's Sabinol

Alberty Phloxo B Tablets

Alberty's Phosphate Pellets

Alberty Riol Tablets

Rico Tablets

Alberty Special Formula Tablets

Alberty's Vitamin A (High Potency) Shark Liver Oil

Alberty's Vi-C

Wheat Germ Oil

Alberty Vitamin B Complex Tablets with High-Potency B<sub>1</sub>

Alberty's Vitamin B<sub>1</sub> with Supplementary Amounts of Other B Complex Factors

Alberty's Lebara Pellets, Plain

Alberty's Lebara Pellets, No. 2

Cheno Herb Tea

Cheno Phytolacca Berry Juice

Cheno Phytolacca Berry Juice Extract Tablets

Cheno Combination Tablets

Tablets Pandora

Recal Tablets

Alberty's Vio-Min Vitamin-Mineral Tablets [75]

Alberty R-Gon Tablets



Alberty's Laxative Blend

Alberty's Ca-Mo Pellets

Alberty's Vitamin A and G Perles (Or Capsules)

Rego

or any other drug which is misbranded within the meaning of 21 U.S.C. 352(f)(1), by reason of the failure of its labeling (1) to enumerate the disease conditions for which such drug is intended and offered to the public, (2) to specify the structures or functions of the body which it is intended to affect and for which it is offered to the public, and (3) to state the dosage and frequency and duration of administration of such drug for the treatment or prevention of such conditions, or for affecting such structures or functions of the body.

It Is Further Ordered, that a Writ of Injunction issue accordingly.

Dated, this 30th day of June, 1951.

/s/ WM. C. MATHES,

United States District Judge.

Costs taxed at \$49.88.

The Foregoing Order Granting Permanent Injunction is hereby approved as to form.

Dated:

.....,

Edward J. O'Connor,

Attorney for Defendants.

Received copy of the within Order Granting Permanent Injunction this 18th day of June, 1951.

/s/ EDWARD J. O'CONNOR,  
Attorney for Defendants.

Judgment entered July 3, 1951.

[Endorsed]: Filed July 2, 1951. [76]

---

In the United States District Court in and for the  
Southern District of California, Central Division

No. 10,322-WM Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALBERTY FOOD PRODUCTS, a Partnership,  
and ADA J. ALBERTY, HARRY ALBERTY,  
FLORENCE ALBERTY, MARGARET  
QUINN, and HELEN HACKWORTH, In-  
dividually and as Co-Partners,

Defendants.

### WRIT OF INJUNCTION

United States of America,  
Southern District of California,  
Central Division—ss.

The President of the United States of America  
to Alberty Food Products, Ada J. Alberty, Harry  
Alberty, Florence Alberty, Margaret Quinn, and  
Helen Hackworth,

## Greeting

Whereas, the United States of America has filed a Complaint and an Amended Complaint in the United States District Court for the Southern District of California, Central Division, against you, and has obtained an Order Granting Permanent Injunction, as heretofore filed and entered in the records of the Clerk of the above-named Court on July 3, 1951,

Now, Therefore, we, having regard to the matters contained in said Complaint and Amended Complaint, Do Hereby Command and Strictly Enjoin you, the said Alberty Food Products, Ada J. Alberty, Harry Alberty, Florence Alberty, [77] Margaret Quinn, and Helen Hackworth, and the agents, servants, employees, and attorneys of all or any of you, and all other persons in active concert or participation with all or any of you, from introducing or delivering for introduction into interstate commerce, and from causing the introduction or delivery for introduction into interstate commerce, directly or indirectly in any form or manner, in violation of 21 U.S.C. 331(a), any of the following drugs:

Alberty's Vegetable Compound Capsules

Alberty's Oxorin

Alberty's Food Regular

Instant Alberty Food

Alberty Garlic Perles (Alberty Garlic and Vegetable Oil Perles)

Alberty's Sabinol

Alberty Phloxo B Tablets

Alberty's Phosphate Pellets  
Alberty Riol Tablets  
Rico Tablets  
Alberty Special Formula Tablets  
Alberty's Vitamin A (High Potency) Shark  
Liver Oil  
Alberty's Vi-C  
Wheat Germ Oil  
Alberty Vitamin B Complex Tablets with High-  
Potency B<sub>1</sub>  
Alberty's Vitamin B<sub>1</sub> with Supplementary  
Amounts of other B Complex Factors  
Alberty's Lebara Pellets, Plain  
Alberty's Lebara Pellets, No. 2  
Cheno Herb Tea  
Cheno Phytolacca Berry Juice  
Cheno Phytolacca Berry Juice Extract Tablets  
Cheno Combination Tablets  
Tablets Pandora  
Recal Tablets [78]  
Alberty's Vio-Min Vitamin-Mineral Tablets  
Alberty R-Gon Tablets  
Alberty's Laxative Blend  
Alberty's Ca-Mo Pellets  
Alberty's Vitamin A and G Perles (or Cap-  
sules)  
Rego

or any other drug which is misbranded within the meaning of 21 U.S.C. 352(f)(1), by reason of the failure of its labeling (1) to enumerate the disease conditions for which such drug is intended and

offered to the public, (2) to specify the structures or functions of the body which it is intended to affect and for which it is offered to the public, and (3) to state the dosage and frequency and duration of administration of such drug for the treatment or prevention of such conditions, or for affecting such structures or functions of the body.

Whereof fail not under penalty of the law thence ensuing.

Witness the Honorable William C. Mathes, Judge of the United States District Court this 11th day of July, 1951.

[Seal]                      EDMUND L. SMITH,  
Clerk, United States District Court, Southern District of California.

By /s/ WM. R. WHITE,  
Deputy.

Returns on Service of Writ attached.

[Endorsed]: Filed August 17, 1951. [79]



[Title of District Court and Cause.]

### SUBSTITUTION OF ATTORNEYS

We, and each of us, hereby substitute Eugene M. Elson, Esq., as our attorney in the above-entitled matter in the place and stead of William V. O'Connor, Esq.

Dated this 29th day of June, 1951.

ALBERTY FOOD PRODUCTS,  
A Partnership.

By /s/ ADA J. ALBERTY,  
/s/ ADA J. ALBERTY,  
/s/ HARRY ALBERTY,  
/s/ FLORENCE ALBERTY,  
/s/ MARGARET QUINN,  
/s/ HELEN HACKWORTH,  
Individually and as  
Co-Partners. [86]

I hereby consent to the above Substitution.

Dated this 17th day of July, 1951.

/s/ WILLIAM V. O'CONNOR.

I hereby accept the above Substitution.

Dated this 16th day of July, 1951.

/s/ EUGENE M. ELSON.

Receipt of copy acknowledged.

[Endorsed]: Filed July 18, 1951. [87]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the defendants above named, and each of them, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order Granting Permanent Injunction and Motion for Summary Judgment entered in the above-entitled action July 3, 1951.

Dated this 24th day of July, 1951.

/s/ EUGENE M. ELSON,  
Attorney for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed July 24, 1951. [89]

---

U. S. EXHIBIT No. 38  
The Alberty Food Products  
729 Seward  
Hollywood 38, California

January 15, 1948

Oxorin Tablets

Robin Egg Blue—Sugar-Coated  
Each Tablet to Weigh  $9\frac{1}{4}$  Grains.

Formula:

Iron Gluconate.....	$2\frac{3}{4}$ grains
Vegetable Concentrates (AA1).....	4 grains
Spleen Substance.....	1 grain
Powdered Ginger.....	$\frac{1}{4}$ grain

[In margin]: (See Gov. Ex. 2)

Received in evidence February 20, 1950. [90]

## U. S. EXHIBIT No. 39

The Alberty Food Products

729 Seward

Hollywood 38, California

## Special Formula Tablets

## 8½-Grain Tablets—Dark Chocolate Coated

Below is formula and is correct as of date——

Feb. 5, 1946 and also verified on March 6, 1946

Each Tablet Is to Contain:

Spleen Substance.....	1	grain
Hemoglobin .....	1	grain
Nucleinic Acid.....	½	grain
Dicalcium Phosphate.....	3	grains
Pancreatin .....	¼	grain
Orchic Substance.....	½	grain
Iron Gluconate.....	0.89	grain*

(Ferrous)

Vegetable Gum Excipients q.s.

The above makes the Iron 4 times the daily requirement by taking 6 tablets per day.

Suggested Use: As a supplementary source of iron, calcium, and phosphorus, Two Tablets Before Each Meal, or Six Tablets Daily, will furnish One-Third the minimum adult requirement of Calcium; One-Fourth that of Phosphorus; and Four times that of Iron.

\*Iron changed November 4, 1947.

[In margin]: (See Gov. Ex. 11).

Received in evidence February 20, 1950. [91]

U. S. EXHIBIT No. 40

The Alberty Food Products  
729 Seward  
Hollywood 38, California

Cheno Combination Tablets Formula

May 21, 1941

Celery & Leaves .....	29 lbs.
Dulse .....	15 lbs.
Spinach .....	11 lbs. 13 $\frac{3}{4}$ oz.
Irish Moss .....	11 lbs. 31 $\frac{1}{4}$ oz.
Psyllium Seed .....	7 lbs. 8 oz.
Parsley .....	7 lbs. 8 oz.
Iron Phosphate .....	1 lb. 3 oz.
DiCal. Phos. ....	32 lbs. 8 oz.

---

113 lbs. 32 oz.  
or 115 lbs. total.

10-Grain Tablets

[In margin]: (See Gov. Ex. 21)

Received in evidence February 20, 1950. [92]

## U. S. EXHIBIT No. 41

The Alberty Food Products

729 Seward

Hollywood 38, California

## Pandora Tablets

Each Tablet to Contain:

Vitamin C .....	15.0	mgm.
Vitamin A .....	1000	I.U.
Calcium Pantothenate .....	5.0	mgm.
Para Aminobenzoic Acid .....	1.0	mgm.
Iron .....	7.5	mgm.
Iodine .....	0.15	mgm.
Sulphur .....	2.5	mgm.
Copper .....	0.25	mgm.
Manganese .....	4.0	mgm.
Base: Dicalcium Phosphate .....	0.5	grains
Yeast, Type 200 .....	1.5	grains
Liver Extract, No. 70 A.I.....	1.25	grains
Vegetable Gum Binders & Fillers, q.s.....	5	grains
Tablet To Be Coated Light Chocolate, Color #15.		

Suggested Use: Two or more tablets daily.

[In margin]: (See Gov. Ex. 22)

Received in evidence February 20, 1950. [93]



U. S. EXHIBIT No. 42

The Albery Food Products  
729 Seward  
Hollywood 38, California

Recal

100 Tablets

6 Tablets Contain:

Dicalcium Phosphate .....1250 Mgs.  
Dulse .....1½ Grains  
Vitamin "D" .....App. 900 Int. Units  
Binder, Dextrose, Starch, Hydrogentated Cotton  
Seed Oil. Lemon Flavor.

Directions: Two Tablets 3 Times Daily, Before or  
After Meals.

[In maring]: (See Gov. Ex. 23).

Received in evidence February 20, 1950. [94]

U. S. EXHIBIT No. 43

The Alberty Food Products

729 Seward

Hollywood 38, California

New R-Gon Formula

Nov. 18, 1947

Calcium Carbonate .....6.75 grains

Sodium Bicarbonate .....1.62 grains

Magnesium Trisilicate .....2.5 grains

Bismuth Subcarbonate .....0.75 grains

Sweetener

Peppermint-Flavored

(To be made up in 15½-Grain Tablets)

[In margin]: (See Gov. Ex. 25).

Received in evidence February 20, 1950.

U. S. EXHIBIT No. 44

The Alberty Food Products

729 Seward

Hollywood 38, California

Alberty Laxative Blend

30	pounds	Senna
10	"	Fennel Seed
9	"	Uva Ursi Leaves
8	"	Licorice Root
7	"	Buckthorn
6½	"	Dog Grass
5	"	Anise Seed
5	"	Nettle Leaves
3	"	Sassafras Bark
3	"	Shave Grass
2½	"	Yarrow
2½	"	Peppermint
2	"	Althae Wood
2	"	Guaiaac Wood
2½	"	Elder Flowers
1	"	Ononis Root
1	"	Buchu Leaves

---

100 pounds

[In margin]: (See Gov. Ex. 26)

Received in evidence February 20, 1950. [96]

[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 99 contain the original Amended Complaint for Injunction; Order to Show Cause; Answer; Order Discharging Order to Show Cause re Preliminary Injunction; Order for Pre-Trial Proceedings; Pre-Trial Stipulation; Pre-Trial Statement of Issues as Stipulated; Memorandum to Counsel; Motion for Summary Judgment, Notice of Motion and Memorandum of Points and Authorities; Statement of Facts that are Material and Exist without Controversy; Supplemental Stipulation; Notice of Hearing of Motion for Summary Judgment; Memorandum of Decision; Findings of Fact and Conclusions of Law on Application for Permanent Injunction; Order Granting Permanent Injunction; Writ of Injunction; Substitution of Attorneys; Notice of Appeal; Statement of Points on Appeal and Separate designations of record on appeal by appellants and appellee which, together with original plaintiff's Exhibits 1 to 44, inclusive, filed pursuant to Pre-Trial Stipulation, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 17th day of August, A.D. 1951.

[Seal]                      EDMUND L. SMITH,  
Clerk.

By /s/ THEODORE HOCKE,  
Chief Deputy.

---

[Endorsed]: No. 13062. United States Court of Appeals for the Ninth Circuit. Alberty Food Products, a partnership, and Ada J. Alberty, Harry Alberty, Florence Alberty, Margaret Quinn and Helen Hackworth, Individually and as Co-partners, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed August 18, 1951.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the Ninth Circuit.



United States Court of Appeals  
for the Ninth Circuit

No. 13,062

UNITED STATES OF AMERICA,

Appellee,

vs.

ALBERTY FOOD PRODUCTS, a Partnership,  
and ADA J. ALBERTY, HARRY AL-  
BERTY, FLORENCE ALBERTY, MAR-  
GARET QUINN and HELEN HACK-  
WORTH, Individually and as Copartners,  
Appellants.

APPELLANTS' DESIGNATION OF THE REC-  
ORD MATERIAL TO THE CONSIDERA-  
TION OF THIS APPEAL AND TO BE  
PRINTED

(Note: In printing please omit caption in all documents except Amended Complaint for Injunction and Writ of Injunction and substitute the phrase "Title of District Court, Cause No. 10,322.")

The record designated as material to the consideration of this Appeal and to be printed is as follows:

1. Order to Show Cause. Filed October 7, 1949.
2. Amended Complaint for Injunction. Filed October 7, 1949.
3. Answer. Filed December 1, 1949.
4. Order discharging Order to Show Cause re preliminary injunction. Filed December 1, 1949.

5. Order for Pretrial Proceedings. Filed December 2, 1949.
6. Pretrial Statement of Issues as Stipulated. Filed February 16, 1950.
7. Pretrial Stipulation. Filed February 15, 1950.
8. Memorandum to Counsel. Filed July 13, 1950.
9. Motion for Summary Judgment and Notice of Motion. Filed July 19, 1950.
10. Statement of Facts that are material and exist without controversy. Filed July 19, 1950.
11. Supplemental Stipulation. Filed September 8, 1950.
12. Notice of Hearing of Motion for Summary Judgment. Filed February 8, 1951.
13. Memorandum of Decision. Filed June 8, 1951.
14. Findings of Fact and Conclusions of Law on Application for Permanent Injunction. Filed July 2, 1951.
15. Order Granting Permanent Injunction. Filed July 2, 1951.
16. Substitution of Attorneys. Filed July 18, 1951.
17. Writ of Injunction, dated July 11, 1951.

18. Exhibits 38 to 44, inclusive.
19. Notice of Appeal.
20. Clerk's Certificate.

Respectfully submitted,

/s/ EUGENE M. ELSON,  
Attorney for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 30, 1951.

---

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY ON THE APPEAL

Appellants hereby state the points upon which they intend to rely on Appeal:

1. The District Court erred in holding that the labeling of Appellants' drugs bearing the labels identified as Exhibits 2, 3, 4, 5, 7, 9, 11, 12, 13, 15, 16, 19, 21, 22, 23, 24, 25, 26, 28 and 29 are misbranded within the meaning of 21 U.S.C., 352 (fo(1)).

2. The District Court erred in granting Appellee's Motion for Summary Judgment as to the drugs bearing the labels identified as the exhibits referred to in paragraph 1 of this Statement.

3. The District Court erred in entering an order granting a permanent injunction and in issuing a

Writ of Injunction adjudging that the drugs bearing the labels identified by the exhibits referred to in paragraph 1 of this Statement are misbranded within the meaning of 21 U.S.C., 352 (f)(1).

4. The District Court erred in holding that a drug is necessarily and in all events misbranded, and its labeling fails to bear "adequate directions for use" under 21 U.S.C., 352 (f)(1), unless, among other things the labeling—

(1) Enumerates all of the disease conditions for which the drug is intended and offered to the public;

(2) Specifies the structures or functions of the body which it is intended to affect and for which it is offered to the public; and

(3) Declares the dosage and frequency of administration for the treatment or prevention of such conditions, or for affecting such structures or functions of the body.

5. The District Court erred in holding that the Motion for Summary Judgment and Prayer for Injunction should be granted, permanently restraining all of the Appellants from introducing, or causing to be introduced, into interstate commerce and from delivering, or causing to be delivered, for introduction into interstate commerce, any of the drugs listed in Finding No. (2) of the Findings of Fact of said District Court unless the labeling thereof—

(1) Enumerated the disease conditions for which any of said drugs were intended and offered to the public;

(2) Specified the structures or functions of the body which any of said drugs were intended to affect and for which any of said drugs were offered to the public; and

(3) Stated the dosage and frequency and duration of administration of any of such drugs for the treatment or prevention of such conditions or for affecting such structures or functions of the body.

6. The District Court erred in holding that in determining the disease conditions or other uses for which drugs are intended and offered to the public, the Court is not restricted to representations and suggestions in the "labeling" of such drugs but should look to collateral newspaper and magazine advertising and any other medium of communication used by the manufacturer, packer or distributor of such drugs.

Respectfully submitted,

/s/ EUGENE M. ELSON,

Attorney for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 30, 1951.



[Title of Court of Appeals and Cause.]

STIPULATION

It Is Hereby Stipulated that Exhibits 1 to 35, inclusive, which are material to the consideration of this appeal, need not be printed since Appellants have agreed to file with this Court 12 sets of said Exhibits.

It Is Further Stipulated that this Stipulation shall be printed as part of the Record in this appeal.

Dated: September 6, 1951.

ERNEST A. TOLIN,  
United States Attorney;

CLYDE C. DOWNING,  
Assistant U. S. Attorney,  
Chief, Civil Division;

/s/ TOBIAS G. KLINGER,  
Assistant U. S. Attorney,  
Attorneys for Appellee.

/s/ EUGENE M. ELSON,  
Attorney for Appellants.

So Ordered:

/s/ WILLIAM DENMAN,  
Chief Judge;

/s/ H. T. BONE,

/s/ WM. E. ORR,  
United States Circuit Judges.

[Endorsed]: Filed September 11, 1951.



No. 13074

---

United States  
Court of Appeals  
for the Ninth Circuit

---

THE COMMANDER DOOR, INC., a corporation,  
Appellant,

vs.

DUNSMUIR LUMBER CO., a corporation,  
Appellee.

---

Transcript of Record

---

Appeal from the United States District Court  
for the Northern District of California,  
Northern Division

FILED

NOV 14 1951

---

PAUL E. O'BRIEN  
CLERK



United States  
Court of Appeals  
for the Ninth Circuit

---

THE COMMANDER DOOR, INC., a corporation,  
Appellant,

vs.

DUNSMUIR LUMBER CO., a corporation,  
Appellee.

---

Transcript of Record

---

Appeal from the United States District Court  
for the Northern District of California,  
Northern Division





# INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Answer ..... 6

Appeal:

Certificate of Clerk to Transcript of Record

on ..... 21

Designation of Record on ..... 17

Notice of ..... 17

Order Extending Time to Designate Record

on ..... 18

Order Extending Time to Docket Record on.. 19

Statement of Points to be Relied Upon on.... 88

Certificate of Clerk to Transcript of Record on

Appeal ..... 21

Complaint ..... 3

Designation of Record on Appeal..... 17

Judgment ..... 14

Minute Order of April 23, 1951..... 13

Motion for Dismissal ..... 61

Names and Addresses of Attorneys..... 1

Notice of Appeal..... 17

## ii.

	PAGE
Order Extending Time to Designate Record on Appeal .....	18
Order Extending Time to Docket Record on Appeal .....	19
Statement of Points to be Relied Upon on Appeal .....	88
Transcript of Proceedings.....	22
Exhibits (for Identification):	
1—Contract dated March 3, 1950, The Commander Door, Inc., and Dunsmuir Lumber Company .....	24
5—Letter written in longhand addressed to “Dear Ed” and signed Ted Bennett, stamped received Oct. 9, 1950.....	51-53
6—Letter dated Oct. 26, 1950, Philip Dorfman to Dunsmuir Lumber Co.....	55
8—Letter dated Sept. 30, 1949, T. D. Bennett to Ed Howell .....	66
9—Letter from T. D. Bennett to Edward N. Howell, dated Feb. 10, 1950.....	69
10—Letter from T. D. Bennett to Edward N. Howell, dated Feb. 23, 1950.....	71
11—Copy of Letter from Commander Door, Inc., to T. D. Bennett, dated July 25, 1950.	74
12—Original Contract dated Feb. 17, 1950, submitted to Mr. Rygel .....	76

Transcript of Proceedings—(Cont'd)	
Exhibits (for Identification)—(Cont'd)	
13—Letter from Dunsmuir Lumber Co. to Com- mander Door, Inc., dated Feb. 20, 1950. . . .	81
14—Letter from T. D. Bennett to Edward N. Howell, dated July 27, 1950. . . . .	84
Motion to Dismiss . . . . .	61
Witness:	
Howell, Edward N., Sr.	
—direct . . . . .	29
—cross . . . . .	37
—redirect . . . . .	48
—recross . . . . .	58





## NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

GLADSTEIN, ANDERSEN & LEONARD,  
GEORGE R. ANDERSEN,  
240 Montgomery Street,  
San Francisco 4, California.

For Appellee:

CARLTON & SHADWELL,  
DANIEL S. CARLTON,  
Carter Building,  
Redding, California.



In the United States District Court for the Northern  
District of California, Northern Division

**No. 6410**

**THE COMMANDER DOOR, INC.**, a corporation,  
Plaintiff,

vs.

**DUNSMUIR LUMBER CO.**, a corporation,  
Defendant.

### COMPLAINT FOR MONEY

Plaintiff complains of defendant and for cause of  
action alleges:

#### I.

That plaintiff, The Commander Door, Inc., is a  
corporation organized and existing under and by  
virtue of the laws of the State of Illinois and that  
its principal place of business is in the City of  
Chicago, State of Illinois.

#### II.

That defendant, Dunsmuir Lumber Co., is a cor-  
poration organized and existing under and by virtue  
of the laws of the State of California and that its  
principal place of business is in the State of Cali-  
fornia.

#### III.

That on or about March 3, 1950, plaintiff ordered,  
in writing, a quantity of lumber from said defend-  
ant, and that said order was placed on plaintiff's  
Order Form No. 2122.

## IV.

That said order consisted by way of general description of certain lumber for the manufacture of doors.

## IV.

That after said order was delivered to and accepted by said defendant, said defendant entered upon the performance of said order and pursuant to the acceptance thereof, shipped and delivered to plaintiff a certain portion of said order, to-wit, lumber for the manufacture of doors.

## V.

That all of said lumber as aforesaid delivered to plaintiff has been accepted by plaintiff and paid for by it.

## VI.

That under the terms of said order, so accepted by defendant as aforesaid, there is a balance of lumber remaining to be shipped on said order totaling the equivalent of 5,350 doors.

## VII.

That said defendant, contrary to the terms of said order and the agreement of the parties, has failed and refused, and presently fails and refuses, to fulfill the balance of said order although demand has been made upon the said defendant that it do complete the balance of said contract.

## VIII.

That due to the present conditions of the lumber market and the difficulty of purchasing comparable lumber in the open market, plaintiff has been un-

able to purchase other or additional lumber within a time reasonably sufficient to enable it to receive delivery thereof, process said lumber into doors, and comply with orders and markets presently available to plaintiff.

### IX.

That said plaintiff earns and makes a reasonable net profit to it of \$4.00 for each door processed and sold from the lumber referred to in the order so accepted by defendant as aforesaid.

### X.

That by virtue of the foregoing, and the failure and refusal of defendant to comply with said agreement, plaintiff has been rendered unable to make, process and sell the said doors and has lost profits from said sales in the said sum of \$4.00 per door, or the total sum of \$21,400.

### XI.

That by virtue of the foregoing, plaintiff has sustained damage in the sum of \$21,400.

Wherefore, plaintiff prays judgment, etc.

As and for a Second Cause of Action, plaintiff alleges:

### I.

Incorporates herein by reference as though fully set forth at this point, the allegations contained in Paragraphs I and II of the first cause of action herein.



## II.

That said defendant has received for the use and benefit of plaintiff the sum of \$362.21.

## III.

That although demand has been made upon said defendant that defendant pay the said sum, the entire said sum is presently due, owing and payable from the said defendant to plaintiff.

Wherefore, plaintiff prays judgment in the sum of \$21,762.21, for costs of suit herein, and for such other and further relief as may be deemed just in the premises.

GLADSTEIN, ANDERSEN &  
LEONARD,

/s/ By GEORGE R. ANDERSEN,  
Attorneys for Plaintiff.

Affidavit of Verification attached.

[Endorsed]: Filed Nov. 6, 1950.

---

[Title of District Court and Cause.]

## ANSWER

Comes now the above named defendant and answering unto plaintiff's complaint and to each and every cause of action therein stated, denies and alleges as follows, to-wit:

## Answer to First Cause of Action

### I.

Answering unto Paragraph I of said first cause of action, defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the statements therein, and placing its denial on this ground, denies each and every, all and singular, the allegations therein contained.

### II.

Answering unto Paragraph II of said first cause of action as to the allegations therein contained commencing with the word "organized" on page 1, line 24, thereof, and continuing to the word "California" on page 1, line 31 thereof, said defendant denies each and every, all and singular, the allegations therein contained.

### III.

Answering unto Paragraph VI of said first cause of action, said defendant denies that the balance of lumber remaining to be shipped under the order therein mentioned is the equivalent of 5,350 doors or any part or portion of said amount in excess of 2,800 partial doors; defendant further alleges that by reason of the facts and circumstances hereinafter set forth the defendant's obligation to ship any lumber whatever to plaintiff has been terminated.

### IV.

Answering unto Paragraph VII of said first cause

of action, said defendant denies each and every, all and singular, the allegations therein contained.

V.

Answering unto Paragraph VIII of said first cause of action, said defendant denies each and every, all and singular, the allegations therein contained.

VI.

Answering unto Paragraph IX of said first cause of action, said defendant alleges it is without knowledge or information sufficient to form a belief as to the truth of the averments therein contained, and placing its denial on that ground, said defendant denies each and every, all and singular, the allegations therein contained and denies that said plaintiff makes a reasonable net profit of \$4.00 on each door therein mentioned or any part or portion of said sum.

VII.

Answering unto Paragraph X of said first cause of action, said defendant denies each and every, all and singular, the allegations therein contained; further answering unto said Paragraph X said defendant denies that plaintiff lost profits in the sum of \$21,400 or any part or portion of said sum.

VIII.

Answering unto Paragraph XI of said first cause of action, said defendant denies each and every, all and singular, the allegations therein contained; further answering unto said Paragraph XI said defendant denies that said plaintiff has sustained

damage in the sum of \$21,400 or any part or portion of said sum.

As and for a Further, Separate and First Affirmative Defense to Said First Cause of Action, defendant alleges:

I.

That the contract mentioned in plaintiff's complaint provided that payment for all lumber shipped thereunder would be delivered to defendant at its place of business by the plaintiff within ten days after date of invoice for said lumber; that consistently and habitually during the course of said contract plaintiff has failed, neglected and refused to make the payments for the lumber shipped to it within the said specified time; that defendant has on various occasions requested of said plaintiff that it meet its payments regularly; that notwithstanding such requests, plaintiff has continued to fail to make payments in accordance with said contract; that by reason of the premises, defendant has notified said plaintiff that it would not ship it further lumber unless it guarantee the making of payments in accordance with said contract through the medium of a letter of credit.

As a Further, Separate and Second Affirmative Defense to Said First Cause of Action, defendant alleges:

I.

That it does not have available presently lumber to fill said order and it has so advised the plaintiff; that the agreement of the parties hereto was sub-



ject to lumber shortages and the parties agreed that the defendant should be excused from performance if lumber was unavailable to it; that the defendant has heretofore advised plaintiff of the unavailability of lumber to it to fill said order; that lumber to comply with said order is available to said plaintiff and defendant has requested of plaintiff that it cause such lumber to be shipped to defendant's mill and that it would manufacture the same for plaintiff's benefit at cost; that said plaintiff has failed, neglected and refused to comply with such request and still fails, refuses and neglects to comply with such request.

As a Further, Separate and Third Affirmative Defense to Said First Cause of Action, defendant alleges:

I.

That the agreement of the parties hereto for the shipment of said lumber provides as follows, to-wit: "That any unshipped portion of this contract may be cancelled at any time without cost to us"; that by reason of the premises, defendant had the right to cancel said contract as to any unshipped lumber without liability or responsibility.

As a Further, Separate and Fourth Affirmative Defense to Said First Cause of Action, defendant alleges:

I.

That during the times mentioned in plaintiff's first cause of action lumber conforming to the terms of the contract therein mentioned was available to



it on the open market and at prices comparable to said contract prices; that said plaintiff could have purchased said lumber and thus obtained the lumber needed by it without damage to itself; that plaintiff has failed and refused to purchase such lumber so as to eliminate its claimed damages.

As and for a Further, Separate and Fifth Affirmative Defense to Said First Cause of Action, defendant alleges:

### I.

That at the time of the making of the contract therein mentioned, and as a condition precedent thereto, plaintiff and defendant agreed that the prices for lumber specified in said contract would be firm except that the same would be increased if labor costs increased; that a labor increase occurred on or about May, 1950, and plaintiff consented to an appropriate increase of prices in said lumber; that a subsequent labor increase occurred on or about September, 1950, and defendant demanded that plaintiff consent to a corresponding increase in said lumber costs; that said plaintiff refused to consent to an increase in lumber costs proportionate to said labor cost increase, and refused to consent to any increase whatever in the costs of said lumber; that by reason of the previous defendant has been relieved from performing said contract.

As a Further, Separate and Sixth Affirmative Defense to Said First Cause of Action, defendant alleges:

## I.

That it has always advised plaintiff that it would comply with the terms of said contract and supply the lumber therein mentioned when lumber was available to defendant and if plaintiff would pay the agreed prices for said lumber and make payments in accordance with the terms of said contract.

## Answer to Second Cause of Action

## I.

Answering unto Paragraphs II and III of said second cause of action, said defendant denies each and every, all and singular, the allegations contained in each of said paragraphs; further answering unto said second cause of action, said defendant denies that it has received any sum of money whatever for the use and benefit of plaintiff and denies that it owes the plaintiff the sum of \$362.21 or any part or portion of said sum.

Wherefore, said defendant prays judgment against said plaintiff as follows, to-wit:

1. That said plaintiff take nothing by its complaint or either of the causes of action therein stated.
2. That defendant be awarded its costs of suit incurred herein together with such other and further relief as may seem meet and proper to the court.

CARLTON & SHADWELL,

/s/ By DANIEL S. CARLTON,

Attorneys for Defendant.

Affidavit of Verification attached.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Nov. 24, 1950.

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Monday, the 23rd day of April, in the year of our Lord one thousand nine hundred and 1951.

Present:

The Honorable Dal M. Lemmon, District Judge.

[Title of Cause.]

### MINUTE ORDER

This being the time heretofore set for the trial of this case without a jury, George R. Anderson, Esq., appearing for the plaintiff; and Daniel S. Carlton, Esq., for the defendant. After hearing counsel, it is Ordered that the complaint be amended to make the defendant corporation a Nevada Corporation instead of a California Corporation; Further that the second defense is here is not valid. On the first cause of action, Edward N. Howell, Sr., and R. A. Howell are sworn and testify for plaintiff. Plaintiff's exhibits 1 to 6 are marked and admitted. Plaintiff rests. Mr. Carlton on behalf of defendant moves for dismissal of the first cause of action. Plaintiff is allowed to present proof in opposition to said motion. Plaintiff's exhibits 7 to 14 are marked for identification. Objection to strike such proof by Mr. Carlton is granted and the first cause of action is Ordered Dismissed. Counsel stipulate that the sum of \$362.21 is correct as to freight charges sought to be recovered. Ordered that plaintiff have judgment

as to his second cause of action in the sum of \$362.21. Judgment and order to be submitted thereon. Findings of fact and conclusions of law are waived by both sides.

---

In the United States District Court for the Northern  
District of California, Northern Division

No. 6410

THE COMMANDER DOOR, INC., a corporation,  
Plaintiff,

vs.

DUNSMUIR LUMBER CO., a corporation,  
Defendant.

### JUDGMENT

The above entitled action came on regularly for trial on April 23, 1951, before the above entitled court sitting without a jury, Messrs. Gladstein, Andersen & Leonard appearing as attorneys for plaintiff and Messrs. Carlton and Shadwell appearing as attorneys for defendant, and evidence, both oral and documentary, having been introduced on behalf of the plaintiff on its two causes of action set forth in its complaint herein, and said plaintiff having closed its case, and said defendant, by its counsel, having moved the above entitled court for an order of dismissal of the action and claim set forth in the first cause of action of plaintiff's complaint herein on the grounds that upon the facts and the law the plaintiff has shown no right to relief and upon the ground that upon said trial the plaintiff had proved that



the defendant had the unqualified right to cancel the contract on which said first cause of action was based at the time said defendant did cancel said contract, and without liability on its part, and said motion was made pursuant to Rule 412 of the Federal Rules of Civil Procedure, and said motion having been duly considered by the court and court having granted said motion as to said first cause of action in plaintiff's complaint herein.

And plaintiff having offered evidence in support of its second cause of action in its complaint and the parties having stipulated in open court that findings of fact and conclusions of law be expressly waived and the court being fully advised,

It Is Hereby Ordered, Adjudged and Decreed, as follows, to-wit:

1. That a judgment of dismissal be and the same is hereby entered in favor of the defendant Dunsmuir Lumber Co., a corporation, and against the plaintiff The Commander Door, Inc., a corporation, in said action as to the purported cause of action set forth in the first cause of action in the complaint in the above entitled action and wherein the plaintiff seeks judgment against the said defendant in the sum of \$21,400.00 upon the grounds that upon the said trial the plaintiff failed to prove a sufficient case before the court, and on the grounds that upon the facts and the law the plaintiff has shown no right to relief on said first cause of action, and upon the grounds that under the evidence submitted by the plaintiff herein, the defendant had the unquali-



fied right to cancel and terminate the contract that is the subject of the first cause of action herein at the time it did so, and without liability on its part.

2. That the above named plaintiff take nothing by its claim set forth in its first cause of action as against the above named defendant and that said defendant do have and recover judgment against said plaintiff on the claim set forth in said first cause of action.

3. That the plaintiff The Commander Door, Inc., a corporation, do have and recover judgment against the defendant Dunsmuir Lumber Co., a corporation, on the second cause of action set forth in the complaint herein, in the sum of \$362.21.

4. It is further ordered, adjudged and decreed that each party shall bear his own costs.

Dated: This 2nd day of May, 1951.

/s/ DAL M. LEMMON,  
Judge.

Entered: May 2, 1951.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 2, 1951.

[Title of District Court and Cause.]

## NOTICE OF APPEAL

To the Clerk of the above entitled Court:

Please Take Notice that the plaintiff in the above-entitled cause hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment heretofore made and entered herein on May 2, 1951 on the first cause of action in the complaint on file herein.

Dated: May 28, 1951.

GLADSTEIN, ANDERSEN &  
LEONARD,

/s/ By GEORGE R. ANDERSEN,  
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 29, 1951.

---

[Title of District Court and Cause.]

## DESIGNATION OF RECORD ON APPEAL

To the Clerk of the above entitled Court:

You Are Hereby Notified that the plaintiff-appellant in the above-entitled matter hereby designates as its record on appeal the entire Clerk's record, including all of the pleadings, findings of fact and conclusions of law, and judgment, said judgment having been entered on May 2, 1951; the entire re-

porter's transcript, including all of the exhibits (save and except the large financial statement in folder form), including all exhibits offered and received in evidence and offered and marked for identification in the trial of the above matter; all of the testimony of all of the witnesses sworn, together with all offers of proof made by plaintiff.

Dated: May 28, 1951.

GLADSTEIN, ANDERSEN &  
LEONARD,

/s/ By GEORGE R. ANDERSEN,  
Attorneys for Plaintiff-Appellant

[Endorsed]: Filed May 29, 1951.

---

[Title of District Court and Cause.]

### ORDER

Good cause appearing therefor, It Is Hereby Ordered that appellant above-named may have to and including the 9th day of August, 1951, within which to designate the record on appeal in the above-entitled cause.

Dated: This 12th day of July, 1951.

/s/ DAL M. LEMMON,  
U. S. District Judge.

[Endorsed]: Filed July 12, 1951.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET  
AND PERFECT APPEAL

Good cause appearing to me therefor, it is hereby Ordered that the time within which to docket the appeal herein is extended to and including August 24, 1951.

Dated: August 3, 1951.

/s/ DAL M. LEMMON,

United States District Judge.

AFFIDAVIT IN SUPPORT OF MOTION EX-  
TENDING TIME TO DOCKET APPEAL

State of California,  
City and County of San Francisco—ss.

George R. Andersen, being first duly sworn, deposes and says: That he is counsel for plaintiff and appellant herein. That the appeal herein was filed with the Clerk of the above-entitled Court at Sacramento on May 29, 1951. That the transcript of testimony of the record on appeal has not as yet been completed.

That pursuant to Rule 73(g) of the Federal Rules of Civil Procedure, the United States District Court may extend the period of time to docket or perfect an appeal for a period of ninety days from the date of the filing of the Notice of Appeal, to-wit: May 29, 1951.

That this morning affiant talked on the telephone

with the official reporter of the above-entitled Court, who advised counsel that the transcript was not as yet ready, had not been transcribed, and that he needed additional time to do it, and after discussion said reporter thought that the work could be done and the transcript filed within another fifteen to twenty days.

That as a result of the reporter's inability, due to press of other work, to file the record as hereinabove mentioned, affiant requests that the time to file the record on appeal be extended to and including August 24, 1951.

/s/ GEORGE R. ANDERSEN

Subscribed and sworn to before me this 3rd day of August, 1951.

[Seal] /s/ AGNES QUAVE,

Notary Public in and for the City and County of  
San Francisco, State of California.

My Commission expires Jan. 14, 1953.

[Endorsed]: Filed Aug. 3, 1951.



[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the record on appeal as designated by the parties.

Complaint.

Answer.

Minute Order of April 23, 1951.

Judgment.

Notice of Appeal.

Designation of Record on Appeal.

Order Extending Time to Docket Appeal.

Order Extending Time to Docket Appeal.

Reporter's Transcript.

Plaintiff's exhibits 1 to 6 incl., and 8 to 14 incl.

In Witness Whereof, I have hereunto set my hand and the Seal of said Court this 22nd day of August, 1951.

[Seal]

C. W. CALBREATH,

Clerk,

/s/ By C. C. EVENSEN,

Deputy Clerk.

In the District Court of the United States for the  
Northern Division of California, Northern District

No. 6410

THE COMMANDER DOOR, INC., a corporation,  
Plaintiff,

vs.

DUNSMUIR LUMBER CO., a corporation,  
Defendant.

Before: Hon. Dal M. Lemmon, Judge.

REPORTER'S TRANSCRIPT

Monday, April 29, 1951

Appearances:

For the Plaintiff: George R. Andersen, Esq.

For the Defendant: Daniel S. Carlton, Esq. [1\*]

The Clerk: Civil Number 6410, Commander Door,  
Inc., vs. Dunsmuir Lumber Company, for trial.

The Court: Both sides ready?

Mr. Andersen: Yes, your Honor.

The Court: I wonder if counsel might call for stipulations or make any admissions to simplify these issues?

Mr. Andersen: I represent the plaintiff, may it please the Court. Has your Honor read the pleadings?

The Court: Yes. I understand them.

Mr. Andersen: The issues are very simple. Our

---

\* Page numbering appearing at top of page of original certified Reporter's Transcript.

cause of action is based upon a contract dated March 3rd, a copy of which I am sure counsel for the defendant has (exhibiting to counsel).

Mr. Carlton: Well, I think that is the contract, your Honor.

The Court: It may be received in evidence. Offer it in evidence, Mr. Andersen?

Mr. Carlton: Yes.

Mr. Andersen: Yes, as Plaintiff's 1, may it please the Court.

(The document referred to was marked Plaintiff's Exhibit Number 1.)



No. 6410  
Exhibit No. 1  
APR 23 1951

PURCHASE ORDER

**COMMANDER DOOR, INC.**

C. W. Calbreath, Clerk

PENNSYLVANIA

LOMBARD, ILLINOIS

PORTLAND, OREGON

EDWARD N. HOWELL, PRES.

DATE March 3, 1950

PAGE 1 of 2

Nº 2122

TO **DUNSMUIR LUMBER COMPANY**

**DUNSMUIR, CALIFORNIA**

THIS NUMBER MUST APPEAR  
ON ALL INVOICES, PACKAGES  
& SHIPPING INSTRUCTIONS

**HOLMES, PA.**

PLEASE SHIP THE FOLLOWING:

ATTENTION: MR. DON RYGL

QUANTITY	ARTICLE	UNIT PRICE	EXTENSION
/L	Cut stock "A" each car consisting of the following  750 pcs. 4-7/8" x 8'-0" 750 " 3 1/2" x 8'-0" 4500 " 2 1/2" x 8'-0" 12000 " 2 1/2" x 19 1/4" 9000 " 3 1/2" x 19 1/4"	\$9.06 per set delivered our plant, Holmes, Pennsylvania	
/L	Cut stock "B" each car consisting of the following  800 pcs. 4-7/8" x 8'-0" 800 " 3 1/2" x 8'-0" 3200 " 2 1/2" x 8'-0" 7200 " 3 1/2" x 25 1/2" 4800 " 2 1/2" x 25 1/2"	\$7.00 per set delivered our plant, Holmes, Pennsylvania	
The above materials are to be old growth Douglas Fir KD to 0-12% moisture content, with 40% minimum vertical grain all B & Better grade, clear, no pitch pockets, knots, etc. Dressed two sides to 1-13/32" Thickness.  The 96" lengths are to be exact precision cut square ends; 19 1/4" and 25 1/2" lengths may be full to 1/4" but not less than 19 1/4" and 25 1/2". All pieces to be double tied in bundles that can be handled by one man.		7.30 M	
<b><i>The Commander Door</i></b> REG. TRADE MARK			

The Blue Copy must be signed and returned to  
us within 10 days giving definite shipping date.

**THE COMMANDER DOOR, INC.**

Per R. A. Howell

Director of Purchases

Accepted by [Signature]

Ship to Holmes, Pa. L.C.L., Motor Freight; Carload, B. & O.





PURCHASE ORDER

**THE COMMANDER DOOR, INC.**

HOLMES, PENNSYLVANIA

LOMBARD, ILLINOIS

PORTLAND, OREGON

EDWARD N. HOWELL, PRES.

DATE March 3, 1950

PAGE 2 of 2

Nº 2123

TO DUNSMUIR LUMBER COMPANY  
DUNSMUIR, CALIFORNIA

THIS NUMBER MUST APPEAR  
ON ALL INVOICES, PACKAGES  
& SHIPPING INSTRUCTIONS

HOLMES, PA.

PLEASE SHIP THE FOLLOWING

ATTENTION: MR. DON RYDEL

QUANTITY	ARTICLE	UNIT PRICE	EXTENSION																																										
<p><b>TERMS:</b></p> <p>3% discount ten days after date of invoice, less freight</p> <p>The prices on this order are firm.</p> <p>Quantity of cars can be decreased or increased as we required in cooperation with the manufacturer.</p> <p><u>SHIPPING SCHEDULE</u></p> <table><tr><td><u>"A" DOORS</u></td><td><u>"A" DOORS</u></td><td><u>"B" DOORS</u></td></tr><tr><td>April 1, 1950</td><td>November 1</td><td>March 15</td></tr><tr><td>May 1</td><td>November 15</td><td>April 1</td></tr><tr><td>May 15</td><td>December 1</td><td>June 15</td></tr><tr><td>June 1</td><td></td><td>August 15</td></tr><tr><td>June 15</td><td></td><td>October 15</td></tr><tr><td>July 1</td><td></td><td>November 15</td></tr><tr><td>July 15</td><td></td><td></td></tr><tr><td>August 1</td><td></td><td></td></tr><tr><td>August 15</td><td></td><td></td></tr><tr><td>September 1</td><td></td><td></td></tr><tr><td>September 15</td><td></td><td></td></tr><tr><td>October 1</td><td></td><td></td></tr><tr><td>October 15</td><td></td><td></td></tr></table> <p>ROUTING: SP UP CRI &amp; P B &amp; O CT. B &amp; O</p> <p>It is understood and agreed that any unshipped portion of this contract may be cancelled at any time, without cost to us.</p> <p><u><i>"The Commander Door"</i></u></p> <p>REG. TRADE MARK</p>				<u>"A" DOORS</u>	<u>"A" DOORS</u>	<u>"B" DOORS</u>	April 1, 1950	November 1	March 15	May 1	November 15	April 1	May 15	December 1	June 15	June 1		August 15	June 15		October 15	July 1		November 15	July 15			August 1			August 15			September 1			September 15			October 1			October 15		
<u>"A" DOORS</u>	<u>"A" DOORS</u>	<u>"B" DOORS</u>																																											
April 1, 1950	November 1	March 15																																											
May 1	November 15	April 1																																											
May 15	December 1	June 15																																											
June 1		August 15																																											
June 15		October 15																																											
July 1		November 15																																											
July 15																																													
August 1																																													
August 15																																													
September 1																																													
September 15																																													
October 1																																													
October 15																																													

The Blue Copy must be signed and returned to us within 10 days giving definite shipping date.

THE COMMANDER DOOR, INC.

Accepted by [Signature]

Per R. A. Howell  
Director of Purchases

Ship to Holmes, Pa. L.C.L., Motor Freight; Carlod, B. & O.









The Court: What is the contention here, that this [2] contract is partially in writing and partially verbal?

Mr. Andersen: No; as I understand the issue from the plaintiff's standpoint, it is simply this, your Honor: my client, the Commander Door Company back east ordered certain cut lumber from the defendant under an order which is now Plaintiff's Exhibit Number 1. The order was accepted by the defendants.

The Court: Your position is that the contract is complete in and of itself?

Mr. Andersen: Complete in and of itself.

Under the contract, they shipped roughly twenty carloads of lumber and did not ship the balance. The balance would make up roughly five thousand doors, and the profit on the doors which my client lost would be approximately \$4.00 a door.

I think they will admit they did not ship the lumber; I don't think there is any question about that.

The Court: I think the pleadings disclose that.

Mr. Andersen: Yes. That is our case, your Honor. The only matter of proof and evidence as far as the plaintiff is concerned is a little cost accounting so far as the profits on the business are concerned. I think that is our case, if you want to put it through in a hurry.

The Court: I will hear from Mr. Carlton.

Mr. Carlton: The issues from the point of view of the defendant would be three primarily, your Honor: Number 1, [3] there is a proposition that payments

were not made in accordance with the stipulated time of the contract, there was a breach.

The Court: It was not rescinded?

Mr. Carlton: Yes, the contract was ultimately rescinded.

The Court: Prior to the bringing of this suit?

Mr. Carlton: Yes; on another ground. That is, it is alleged that the contract was cancelled——

The Court: Now, as long as you brought that subject up, I notice in your second defense you make that allegation, and it strikes me that this would amount to a variance by the defendant of the terms of the contract.

Mr. Carlton: You mean on the payment matter, your Honor?

The Court: You alleged the terms of the contract were that the payment would be made within ten days after date of invoice, and then you notify the plaintiff that you won't ship any more unless they make some arrangements to make payments promptly. Now you are attempting to vary the terms of that contract by your own allegation.

Mr. Carlton: No, there were subsequent negotiations that went along.

The most material things, your Honor, are two: Number 1, that the contract on its face states in two places that it is understood and agreed that any unshipped portion of this contract may be cancelled at any time without cost to us.

The Court: You have that in another defense, Mr. Carlton. [4]

Mr. Carlton: That is right.

The Court: But I am referring to this particular defense, this second defense.

Mr. Carlton: Well, the payment program is in the background. Although we are not relying on that particularly, we are not abandoning it——

The Court: It struck me that your second alleged defense is not——

Mr. Carlton: —but the defense we insist on very seriously is that the contract provides twice on its face that “It is understood and agreed that any unshipped portion of this contract may be cancelled at any time without cost to us.”

The Court: And you claim it was cancelled prior to the bringing of this suit?

Mr. Carlton: That is correct, and that is alleged in the complaint it was cancelled, and in our position that, I think, applies to both parties, that if it applies to one party it makes no difference, it can be cancelled by the other, under the California authorities. [5]

\* \* \* \* \*

EDWARD N. HOWELL, SR.,  
recalled for the plaintiff, previously sworn.

#### Direct Examination

Mr. Andersen: Q. Mr. Howell, with respect to this order dated March 3rd, with which you are familiar, how long has your company been engaged in this particular business?

A. Since early 1945, this particular company.

Q. That is right after you came out of the service?

A. That is right after I came out of the service.

(Testimony of Edward N. Howell, Sr.)

Q. And last year what was your gross value of business?

A. 1950 was over a million.

Q. Over a million dollars. And how was it in 1949, approximately?

A. Oh, it was very close to a million.

Q. Very close to a million. Has it been increasing year by year?      A. That is right. [15]

Q. Now originally you placed this order with this company about a month before March 3rd, on or about February 17th, is that correct?

A. In February, yes.

Q. And in planning the manufacture of doors there, you set up your manufacturing process according to shipments as received by you, is that correct?

A. Would you repeat that?

Mr. Andersen: Would you read the question, Mr. Reporter?

(Question read.)

A. That is right.

Q. Now on plaintiff's exhibit number 3, on the second page you set forth a shipping schedule, is that correct?      A. That is correct.

The Clerk: That is 1.

Mr. Andersen: I am sorry, exhibit 1.

A. That is right, the shipment schedule is exactly as we required them.

Q. And was it necessary for your plant operation to have these shipments arrive approximately as scheduled?      A. Yes, it was.



(Testimony of Edward N. Howell, Sr.)

Q. Now sometime before March the defendant company refused to ship further, is that correct?

A. Before March? September.

Q. Pardon me, I am wrong on the date there, sometime about a [16] month before the lawsuit was filed?

A. Well, for the last three or four shipments according to that schedule we called and asked them, or wired them for shipping dates; we just had to take up each shipment along toward the last with them.

Q. And then at a point they wanted an increase in price, did they? A. Yes, they did.

Q. In other words, you had a conversation with the defendants where they wanted to increase the price about ten or fifteen per cent?

A. There was a seven per cent increase we acquiesced in, in order to keep the merchandise coming to us. There is one thing you have to remember, this is not ordinary lumber, crude lumber, this is processed lumber.

Q. Yes, that has already been brought to the attention of the court. Then at a later point they wanted you to post a letter of credit, did they?

A. Yes. We had a letter from their representative to that effect.

Q. Then they refused to ship completely, did they? A. Yes.

Q. Then thereafter did you have a telephone conversation with Mr. Rygel?

A. We didn't get the car that was supposed to be shipped [17] either the last of September or the first



(Testimony of Edward N. Howell, Sr.)

of October. We called them and asked them for it.

Q. And at that particular point did you have a conversation with them regarding the necessity of your receiving lumber according to the approximate schedule as ordered?

A. I explained to them we were committed on shipments of these doors and it was necessary we have them.

Q. Now with respect to the lumber itself, this lumber was all cut to size, was it?

A. To exact sizes. We even paid a premium to have them made to exact sizes.

Q. So when they got to your plant you simply remodeled them in door form?

A. No, we placed them in our tenon and moulding machines and made the tenons and mouldings on them. In other words, we saved ripping, cutting, and sawing, three operations. We put them right through the moulding and tenon machines, which gave us more capacity for our own machinery for other doors which we manufactured.

Q. Now in your conversation with Mr. Rygel, who is the President, I understand, of the defendant corporation, did you explain to him the necessity of obtaining this finished and cut lumber as you have just indicated?      A. Yes.

Q. And did you explain to him that this lumber that you [18] bought from him was part and parcel of the doors which you sold?

A. Yes; he knew that.

(Testimony of Edward N. Howell, Sr.)

Q. And did you explain to him it was precisely for that purpose and none other?

A. That is right.

Q. And did you explain to him that you had sales already for those doors? A. Yes, I did.

Q. And did you discuss a lawsuit with him?

A. We finally wound up, I told him the only thing I saw to do was to sue him, because I had no method to procure these doors to fill the orders which we already were committed for.

Q. Did you tell him, however, you did not want to sue him?

A. That is right, we did not want to sue anybody.

Q. You wanted the lumber?

A. That is right.

Q. And all of this lumber went into these doors, and for no other purpose? A. That is right.

Mr. Andersen: Now I will direct your Honor's attention—I don't know whether the Court noticed this or not—on Plaintiff's Exhibit Number 1 the order calls for the purchase of doors as such, may it please the Court.

Mr. Carlton: What is that? [19]

Mr. Andersen: I was just directing the matter to the attention of the Court.

Mr. Carlton: Well, I just wish you would refer to the portion you are referring to so I will be familiar with it.

Mr. Andersen: On the second page.

Now I was going to interrogate the witness, may it please the Court, regarding the availability of lum-

(Testimony of Edward N. Howell, Sr.)

ber, but I think that is more properly a matter of defense, rather than on our case in chief.

The Court: Except insofar as it relates to the question of damages.

Mr. Andersen: Well, I am of the opinion that is a matter of defense. I may be wrong, your Honor. I think in matters of this kind, I think the rule is—I could be mistaken, I have been mistaken before, that all we have to show is the order, the failure to comply with the contract, and the failure to—and damages. I don't believe it is up to us to prove the litigation, if any.

The Court: No, it is up to you to prove the damages.

Mr. Andersen: That is all. Now, with respect to the sales price of these doors and the cost of manufacture, what on the "A" door was the amount of profit made by your company?

A. Will you repeat that again?

Mr. Andersen: Will you read it, Mr. Reporter, with his Honor's permission? [20]

The Court: Mr. Andersen, as I understood this witness, he said that he told the President of the defendant corporation that there was no way of getting the parts that went into the doors.

Mr. Andersen: Yes, your Honor.

The Court: Now that is no proof that he could not do it, it is proof of a statement made by the President of the corporation.

(Testimony of Edward N. Howell, Sr.)

Mr. Andersen: That is correct. I will clear that up.

(Question read.)

Mr. Carlton: I object to the question, no foundation laid, incompetent, irrelevant, and immaterial, and not the proper element of damages.

The Court: I am sustaining it for the same reason given before.

Mr. Andersen: To clear up the point raised by your Honor with respect to the material that went into the door—wood, was it?

A. That is right.

Q. Now with respect to the wood that went into the door, were you able to procure that wood anyplace else? A. No, we were not.

Q. And did you try, make efforts throughout the United States? A. We did. [21]

Q. To purchase that type of wood in different places? A. We did.

Q. And with what results?

A. We could not get any.

Q. Now again with respect to the operation of your business and the sale of these doors, were you filling those doors on order?

A. Yes, we worked against orders all last year.

Q. And you were unable to fill those orders to the extent of this order, that is, Plaintiff's Exhibit Number 1?

A. That is right, we were short that many doors for the year's business that we had sold.



(Testimony of Edward N. Howell, Sr.)

Q. You were unable, then, to purchase this lumber?

A. We could not purchase the cut stock which we ordered from him.

The Court: Q. Couldn't you purchase the lumber and have it cut somewhere else?

A. No, we could not. Last year was a big run year, everybody was running to capacity. Nobody was taking orders for cut stock.

Mr. Andersen: Q. And now with respect to your plant operation, the wood that you required, did you require it to be general or miscellaneous stock, or did you require it to be cut lumber as this order shows?

A. It had to be precision cut. [22]

Q. Now with respect to the order that you have here on Page 1, all of those measurements are precise and specific, are they?

A. Well, the pieces eight feet long are precision cut, and we allowed one and a quarter inch difference on the other pieces. That is all on there.

Mr. Andersen: Now, may it please the Court, on this question of damages, I don't know whether there is a running objection has been going to this or not. It is our position we being unable to purchase the lumber, we actually purchased doors from these people, and being then unable to get lumber to make up the doors that the damages are precisely as pleaded, namely, the difference——

The Court: It is the profit you would have made——



(Testimony of Edward N. Howell, Sr.)

Mr. Andersen: Precisely.

The Court: —had the lumber been delivered?

Mr. Andersen: Yes.

The Court: Well, it would seem to me, Mr. Carlton, if one cannot purchase in the open market, that there must be some measure of damage and recovery to the plaintiff, and it would seem to me the reasonable measure would be his loss from the breach of the contract.

Mr. Carlton: Well, it would appear from this gentleman's testimony that would be an issue of fact, your Honor. I would like the privilege of cross examining him, if counsel is through. [23]

The Court: Yes, surely.

Mr. Andersen: Well, you may cross examine, then, Mr. Howell.

#### Cross Examination

Mr. Carlton: Q. Yes. Mr. Howell, as I understand it, you are the President of the plaintiff?

A. I am President of the corporation.

Q. Do you recall when you discussed this matter with Mr. Rygel in late September or early October, that he advised you that he could not get from his woods where he was having his logging done—they weren't developing fir at that particular time, that it was coming in in a heavy quantity of pine?

A. I didn't know that Mr. Rygel owned his own woods.

Q. Do you recall the conversation?

A. I recall a conversation with him that he was not cutting fir any more, he was cutting pine.

(Testimony of Edward N. Howell, Sr.)

Q. All right. Now do you recall Mr. Rygel telling you that if you wanted to acquire the fir lumber on the market that he would mill it at the mill for you at cost?

A. I don't recall him saying that.

Q. Do you recall any conversation at all where Mr. Rygel told you in substance as follows, "My logging is not developing fir now, therefore I can't fill the order. If you want to acquire the lumber stock on the market, I will mill it at my absolute cost to you?" [24]

A. I don't remember that, because I had no method of getting lumber for him.

Q. And do you recall in that conversation, Mr. Howell, that you told Mr. Rygel, "Why, you ought to be able to get that lumber. I just got five carloads within a hundred miles of you"?

A. That is right, I did say that.

Q. "And had a cheaper price than under this contract"?

A. Not cheaper.

Q. Well, did you tell him that?

A. No, not my memory.

Q. And did you tell Mr. Ted Bennett of Portland—you know who I am talking about, do you not?

A. Yes, I had dealings with Mr. Bennett.

Q. And did you tell Mr. Bennett that you had just purchased five carloads of this lumber at a better price than the Dunsmuir Lumber Company price, and that you could get more?

A. I would like to explain that, sir. The difference

(Testimony of Edward N. Howell, Sr.)

in lumber and cut stuff are two different things. When you buy lumber in the rough——

The Court: The question is did you tell him that.

Mr. Andersen: May I object to that as immaterial for the reason this order refers precisely to cut stock and not general lumber, may it please the Court.

The Court: I think this is within the range of cross [25] examination. Overruled.

Mr. Andersen: All right.

Mr. Carlton: Q. Now, did you tell Mr. Bennett over the telephone that you had just purchased five carloads of lumber the same as under this contract and at a more favorable price than you were getting from Dunsmuir?

A. Not the same as under that contract, no, because we refused all that lumber, it was inferior grade and we couldn't use it.

Q. Did you tell him you could get more?

A. No.

Q. Did Mr. Bennett—withdraw that. Didn't Mr. Bennett tell you that he could get you—fulfill this order for you——

Mr. Andersen: May I interrupt just a moment? Would you identify Mr. Bennett, Counsel?

Mr. Carlton: Yes. Mr. Bennett is the lumber broker who handled this transaction originally. He was, and is, I believe, on the Board of Directors of the defendant, although he has never taken any active part in the management of it.

Mr. Andersen: And he was speaking for Dunsmuir Lumber Company during all of this time?

(Testimony of Edward N. Howell, Sr.)

Mr. Carlton: No, he was not speaking for Dunsmuir Lumber Company. He was the intermediate broker, and that was his only capacity in that deal. He is here and he will testify.

Q. Now I want to ask you if Mr. Bennett didn't tell you in [26] late September or early October when you were talking about the remainder of this shipment that the Dunsmuir Lumber Company was out of fir?

A. He wrote me a letter.

Q. All right, did he tell you that the Dunsmuir Lumber Company was out of fir?

A. In the letter.

Mr. Andersen: I would like to object to that, the letter is the best evidence. We have it, if counsel wishes to produce it—wishes to use it.

Mr. Carlton: I am asking the man if he told him that, and he says, "by letter". I take it that is a sufficient answer.

Q. Now, over the telephone did Bennett tell you that he could get you either the cut stock or the lumber for cutting on the market at comparable prices under this Dunsmuir contract?

A. Definitely no.

Q. He did not. Did you tell Mr. Bennett that no, you didn't want that, that you—Dunsmuir would either produce that or you would sue them?

A. I don't remember any such conversation.

Q. You don't remember any such conversation. Now, this Plaintiff's exhibit 1 is not a sale of doors, is it, Mr. Howell?

A. Which is 1?



(Testimony of Edward N. Howell, Sr.)

Mr. Andersen: I object to that, the contract speaks for [27] itself, may it please the court.

Mr. Carlton: Well, you have been saying that it is a sale of doors.

A. That is what it says on its face.

Mr. Carlton: Q. Is there "door" in that contract, Plaintiff's Exhibit 1?

A. It says, "door parts".

Q. All right. Now, what the contract calls for, Mr. Howell, is a certain type of lumber surfaced on two sides, which means that it is simply planed in a planing mill, doesn't it?

A. Surfaced two sides.

Q. That means planing, doesn't it, is that right?

A. Yes.

Q. And then it is cut to certain dimensions; that is, width, thickness, and length. That is correct, isn't it?

A. That is a manufacturing process.

Q. Well, that is what this Plaintiff's Exhibit 1 calls for as to this particular type of lumber, isn't it?

A. That is correct.

Q. All right. And then in order—what you would get back in Pennsylvania under this Plaintiff's Exhibit 1 would be a certain number of boards which would be Douglas Fir?

A. No boards at all, cut stock.

Q. All right. They were cut from boards, I take it?

A. Well, they were cut from boards, and the boards from trees. [28]

Q. Is there anything added to that?

A. Added to the boards?



(Testimony of Edward N. Howell, Sr.)

Q. Yes.

A. These were not boards, sir.

Q. What they were, what was shipped thereunder were pieces of lumber of certain widths, thicknesses, and lengths which had simply been surfaced on two sides, is that not correct?

A. That is not correct, sir, they were processed to a certain extent, to a part of a door.

Q. What processing are you referring to?

A. They were to be in dimensions so they could be put in moulding machines and tenon machines.

Q. Cut to size, cut up into thicknesses and lengths, is that it?

A. Cut to measurement for the doors.

Q. That is all dimension means, doesn't it?

Mr. Andersen: May I suggest we are getting to argument now, your Honor?

The Court: Overruled.

Mr. Carlton: Q. Now, if you were unable to get this stock from Dunsmuir, did you have any objection to getting the same quality of lumber in random lengths and then having it cut to stock?

A. You mean cut to different dimensions?

Q. That is right. [29]

A. By some other company?

Q. That is right.

A. We have had no objection to that.

Q. And that would have been a complete fulfillment of your order if you had been able to do that? You would have gotten what you wanted under this contract if you had been able to do that?

(Testimony of Edward N. Howell, Sr.)

Mr. Andersen: I object to that as speculative and argumentative.

The Court: Sustained.

Mr. Carlton: Q. You, as a matter of fact, in your Pennsylvania plant rip, and what is the other process, saw?

A. Rip and cut off.

Q. Rip and cut off in order to produce the boards to these dimensions, don't you?

A. That is right.

Q. You have a good deal of machinery devoted to that purpose, do you not?

A. A very modern mill.

Q. What is that?

A. We have a modern mill.

Q. And in that modern mill you do a great deal of ripping and sawing off to lengths in order to produce lumber to this so-called cut stock?

A. We run to capacity. [30]

Q. Well, you do that, do you not?

A. We do that.

Q. Now do I understand you to testify that you could not get in the United States lumber stock of the character involved in Plaintiff's Exhibit Number 1 in early October of 1950?

A. We exhausted every means we knew to get cut stock, and couldn't get it.

Q. Now you didn't answer the question.

Mr. Andersen: I submit it was an answer, may it please the Court.

Mr. Carlton: Q. Did you—did you testify that you could not get lumber of the quality described in

(Testimony of Edward N. Howell, Sr.)

Plaintiff's Exhibit 1 in early October of 1950?

A. We had all of our machines running in full capacity on lumber in the twenty other sizes shown on that price list, and we purchased cut stock to relieve the pressure in the cutting and ripping. In other words, we can only cut and rip so many pieces of lumber in a day, and this was in addition to everything we could do.

Q. Now would you mind answering the question? Your answer is not responsive to the question.

The Court: Read the question, Mr. Reporter, and listen to it.

(Question read.)

A. Buy lumber, that is true, yes, you could buy lumber. [31]

Mr. Carlton: Q. You could have bought this lumber?

A. We could not have bought cut sizes.

Q. Mr. Howell, cut stock and lumber is different, isn't it?

A. Cut stock is lumber processed.

Q. But I understand your answer now to be that you could have bought lumber equivalent of the amount that you wanted to fulfill this order during the periods which you claim that the defendant did not ship you?

A. We could have bought lumber. We could not have processed it.

Q. All right. Is it not a fact that Dunsmuir Lumber Company, through Mr. Rygel, on the telephone

(Testimony of Edward N. Howell, Sr.)

told you that if you would acquire the lumber that he would mill it and cut it to stock at his bare cost?

A. I don't recall him saying that he would do it at his cost.

Q. Do you recall any conversation about Mr. Rygel stating that if you would acquire the lumber that he would cut it to stock?

A. I don't remember him saying that.

Q. Didn't Mr. Bennett tell you that?

A. That is in his letter.

Q. Well, did he tell you that?

A. He wrote me a letter.

Q. Now, do I understand you to testify, Mr. Howell, that [32] while lumber of the specifications under Plaintiff's Exhibit Number 1 was available at the period here in issue, that you could not get a mill anyplace to go through the simple process of ripping and sawing that into different dimensions?

A. That is right.

Q. You could not do that anywhere in the United States?      A. That is right.

Q. Did you ever hear of milling in transit?

A. Yes.

Q. What is it?

A. Most of the time it is taking rough boards and planing them to size and kiln drying them.

Q. Milling in transit is where lumber in raw stage is purchased near the source of the original market and during the course of transportation east or to other destinations it is further refined or re-manufactured?



(Testimony of Edward N. Howell, Sr.)

A. It is usually done by the manufacturers themselves, not by someone selling the part.

Q. I understand, but milling in transit means that?

A. Well, I couldn't get anyone to do that.

Q. Then I understand that you could not get a concern in the United States to reduce some six or seven carloads of lumber to dimensions under this contract?

A. I didn't contact everybody in the United States. Those I contacted all refused. [33]

Q. Who did you contact?

A. Warehouser, Timber Structures, F. W. Ashley.

Q. Where is Warehouser?

A. Warehouser, sir, is a national company, a very large lumber outfit in Tacoma, Washington.

Q. Did you contact any of the concerns of Redding?

A. I don't know, I don't remember. We just took the Lumberman's Association and wrote to a lot of them who manufactured lumber, and they all refused.

Q. Did you contact any of the concerns in Siskiyou County, such as Long Bell?

A. Well, F. W. Ashley has been the Long Bell man for about ten years. I contacted him.

Q. Did you contact the McCloud Lumber Company?

A. No, I am not familiar with the lumber companies out here.



(Testimony of Edward N. Howell, Sr.)

Q. As a matter of fact, you have been out on the coast before?

A. I have been out here four times before.

Q. Were you ever out here after Plaintiff's Exhibit 1 was entered into?

A. Not at the plants.

Q. Were you ever on the Coast prior to this trip after the signing of the contract with the defendant?

A. No, I wasn't on the Coast.

Q. Did you ever have any representative on the Coast during [34] that period? A. No.

Q. All right. Are you familiar with the electric planing mill operation in Stockton within about fifty miles of this court room? A. No.

Q. Did you contact them there to get cut stock or to get random length stock?

A. I don't know any particular individual lumber company within fifty miles from the court room.

Q. And you didn't contact any, anyway?

A. No; Timber Structures in Portland is a very large outfit. They refused. Dant and Russell is one of the largest—

Q. As a matter of fact, speaking of Portland, didn't Mr. Bennett tell you in late September and early October there were two concerns in the vicinity of Portland that would have given you the cut stock that you desired?

Mr. Andersen: May I interrupt? I didn't hear the answer. Was that in letter or by telephone, Counsel?

Mr. Carlton: What was the answer, if it was answered? A. No.

(Testimony of Edward N. Howell, Sr.)

Q. Where did you buy the five cars of lumber?

A. I think my brother will have to answer that. He does all the procurement. I don't remember.

Q. Did you tell Bennett and Rygel both by telephone that you [35] had bought the cars within a hundred miles of the Dunsmuir Lumber Company plant?

A. I told him we had bought five cars, which later I found to be no good and they were all refused.

Q. Did you tell him they had proved to be no good?

A. No. We hadn't got them by that time. We were buying them for the door we were cutting, sir, not this one.

Q. When you bought them in cut stock, did you buy them in doors or lumber?

A. We bought them in lumber.

Q. Where was that to be cut?

A. That was to be processed in our own plant.

Q. And that was in late September?

A. We bought lumber all the year round.

Q. I asked you, that was in late September?

A. I don't remember whether it was late September. Along that time.

Mr. Carlton: That is all. Thank you.

#### Redirect Examination

Q. (By Mr. Andersen): Just a few further questions, your Honor. Counsel asked you questions about lumber that you processed yourself—

Mr. Carlton: Mr. Andersen, might I ask you to

(Testimony of Edward N. Howell, Sr.)

talk just a little louder? Your back is to me and it is hard for me to hear. [36]

Q. (By Mr. Andersen): Counsel asked you questions about lumber that you processed yourself, lumber that you buy for doors that you assemble. Would you just generally explain the operations of your mill there?

A. Well, we make about twenty sizes of doors that we carry in stock, and these two models that we bought the cut stock for are a large number of those that we sell. We reserve—by being able to purchase cut stock, it gives us the opportunity to use our own mill in the twenty other sizes that are made in less number, and that is why we bought the cut stock for models 43 and 64 which are referred to on this contract, sir, as “A” and “B” stock. If we were to cut out the stock for the “A” and “B” doors, it would cut the number of doors down that we could make in our own mill about fifty per cent.

Further, in cutting out these particular boards, they cut them from a less expensive stock than we buy. We have to buy “C” selects and better, where I understand the mills can use a lower grade and cut around knots to get these short pieces without having a long break on them. That is why we buy these small doors by cut stock.

Now, at that time we were taking cut stock from anywhere. We were in such dire need of this material that we just didn’t fill our orders. That is all there was to it.

Q. During this particular time was your plant

(Testimony of Edward N. Howell, Sr.)

operating to capacity? [37]           A. Yes, it was.

Q. And you were unable, then, to process this particular type of door?

A. That is right. We just suffered the loss of that many sales—that many doors.

Q. How many doors were involved in that loss of sales?           A. That is around 5,000 doors.

Q. Around 5,000 doors?

A. I think 5,300 doors, something to that effect.

Q. Now, counsel interrogated you regarding the—well, let me ask you one other precise question: Why didn't you buy lumber and rip and cut it to the size of lumber——

A. We were unable to get it from anywhere that we tried. We would have taken it from anybody.

Q. And did you have plant facilities to do it?

A. To cut the stock?

Q. Yes.

A. We could not do it ourselves. We tried to buy it from other plants.

Q. In other words, what you tried to do was buy cut stock?           A. That is right.

Q. Rather than lumber?           A. That is right.

Q. You didn't have the plant capacity to do it yourself?           A. That is right. [38]

Q. Now, also in respect to this order shown in Plaintiff's Exhibit 1 in evidence, were those orders that you had for these "A" and "B" doors to be shipped within precise times, or within general time limits, to be filled in general time limits?

A. Well, the average time is about thirty days.



(Testimony of Edward N. Howell, Sr.)

Anywhere from ten to thirty days shipment after order.

Q. You had to have this lumber within a specified time, did you? That is, this cut stock?

A. Well, in order to get it out during that year we had to have it at those times.

Q. Now, counsel interrogated you regarding Mr. Bennett. Did you have a telephone conversation with Mr. Bennett, or did you have letter correspondence with Mr. Bennett?

A. Well, with reference to this fir they were referring to they could get was in the form of a letter.

Q. That was in a letter, was it? A. Yes.

(Recess.)

Q. (By Mr. Andersen): Just before the recess I was interrogating you about a letter received from Mr. Bennett. I have shown counsel the letter, and I hand you a letter dated October—it is not dated, but it bears the receipt stamp of October 9th, 1950. Is that the letter to which you referred?

A. That is right.

Mr. Andersen: May I read it, your Honor? [39]

The Court: Very well.

Mr. Andersen: This letter is from Mr. Ted Bennett, and it is addressed to the plaintiff company. The salutation, however, being, "Dear Ed."

"You will have to forgive this pencilled note, but I just arrived and must be on my way again.

"I stopped at the mill and there just isn't any stock to finish out the car for you. As I explained to



(Testimony of Edward N. Howell, Sr.)

you over the phone, production is necessarily on pine and will probably remain so for some time.

“The only solution was to pick up lumber from other sources near the mill so that you would continue receiving the same quality and texture. I spent some time on this, and feel sure that I can work this out on the remaining few cars and possibly on the other five/ten you require.”

Could I interpolate: What does five dash ten mean?

A. That they would try to get five or ten cars in addition to that contract.

Mr. Andersen (Continuing reading): “The other five/ten you require. However, the policy of the mill does not permit purchase of outside lumber for resale, except on an irrevocable letter of credit. On their own stock, of course, this [40] would be unnecessary, but purchasing outside stock, drying, surfacing, *roofing* and cutting to specific requirements. can only be handled on a L/C.”

Does that refer to less than carloads?

A. I imagine that is less than carloads.

Mr. Andersen (Continuing reading): “As you know, clears have increased in price all year, consequently, in order to come out on the price will have to be increased approximately twenty per cent per set, possibly only fifteen/seventeen per cent, if the shorts could be run to 9/16 inch panel stock for you.

“This appears to be the only way to continue shipments to you at this time.

“I expect to check further on my way back to

(Testimony of Edward N. Howell, Sr.)

Portland, and expect to be back in the office next Tuesday. I will await your advice. Perhaps you should call me.

“Kindest regards, hurriedly, Ted Bennett.”

May I underscore a portion of this for the Court’s—well, that is more particularly a part of argument. I will offer this in evidence, may it please the Court.

(The document referred to was marked Plaintiff’s Exhibit Number 5.) [41]

Mr. Andersen: Q. Now, after receiving that—strike that, please. When you were questioned about receiving information from Mr. Bennett, was that the letter that you had in mind? A. Yes.

Q. And is that the only pencilled letter that you received from Mr. Bennett? A. Yes.

Mr. Andersen: That letter, your Honor, is written in longhand.

Q. Now, after that did you have another conversation with Mr. Bennett regarding lawsuits?

A. I did talk to him on the phone, and I told him I expected him to fulfill his contract and buying up his lumber at an additional price would be their problem and not mine.

Q. And did you discuss with him the necessity of you having that lumber?

A. I did, that we had no leeway—we had no way of getting it.

Q. Did you tell him you had no way of getting it, or surfacing it, or finishing it?

A. No, we couldn’t do it on account of our own capacity that we had taken up.

(Testimony of Edward N. Howell, Sr.)

Q. Now, again, shortly before the suit was filed—

Mr. Andersen: May I have the plaintiff's letter to you of October 26th? [42]

Mr. Carlton: Whose letter?

Mr. Andersen: Mr. Dorfman's letter to you of October 26th.

Mr. Carlton: Oh, the attorney?

Mr. Andersen: Yes. I will use the copy.

Q. Then before the suit was filed; to wit, on October 26, 1950, did you have your counsel in Philadelphia write to the defendant? A. Yes.

Q. Mr. Dorfman being the counsel?

A. That is right.

Mr. Andersen: I will offer this letter in evidence as Exhibit next in order.

Mr. Carlton: We object as immaterial, if the Court please.

Mr. Andersen: And I would like to read the last paragraph only.

The Court: Well, I can't determine the materiality unless I see it.

Mr. Andersen: We are only concerned with the last paragraph, your Honor.

(The document was handed to the Court.)

The Court: I think you mean the next to the last paragraph.

Mr. Andersen: Possibly so, your Honor. [43]

The Court: I think the last paragraph is pertinent.

Mr. Andersen: I didn't hear what the Court said.

The Court: I think the last paragraph is pertinent.  
You may——

(Document referred to was marked Plaintiff's Exhibit Number 6.)

PLAINTIFF'S EXHIBIT No. 6

Dunsmuir Lumber Co.

October 26, 1950

Dunsmuir, California

Att.: Mr. Daniel Rygel

My dear Mr. Rygel:

Please be advised that I represent The Commander Door, Inc, who advise that you refused to complete delivery of the cut stock covered by firm order of March 3, 1950, No. 2123, in that you have advised them that you will not deliver the A doors scheduled for October 1, October 15, November 1, November 15 and December 1, and the B-doors due October 15 and November 15, unless they agreed to change the terms and conditions of the orders providing for a further increase in price of 20%, as well as the posting of Letters of Credit.

As you know, this lumber was ordered from you for the purpose of manufacture into doors which have already been sold by The Commander Door, Inc. Efforts to obtain similar stock have been completely fruitless since, as you know, there is no open market for cut stock.

Unless delivery of these doors is completed in accordance with the terms of the order, it will mean that my client will not only sustain a loss of \$4.00 per set on 5,350 sets scheduled for delivery, or a total of \$21,400., but will also suffer irreparable injury so far as their business reputation is concerned.



**Plaintiff's Exhibit No. 6—(Continued)**

I am forwarding this matter immediately to counsel on the West Coast with instructions to institute suit during the coming week for all damages to which we shall be subjected, as a result of your unwarranted breach of contract. I trust that you will wire or call me immediately upon receipt of this letter and advise of your intention to complete delivery under the terms of the order, so that it will not be necessary to proceed with the said suit.

Thanking you for giving this matter your prompt attention, I am,

Very truly yours,

PHILIP DORFMAN

PD:LD—Air Mail

---

The Court: Pertinent to the extent that it contains a demand upon the plaintiff.

Mr. Andersen: Yes, sir. The last paragraph—

The Court: Next to the last paragraph.

Mr. Andersen: (Reading:) "I am forwarding this matter immediately to counsel on the West Coast with instructions to institute suit during the coming week for all damages to which we shall be subjected, as a result of your unwarranted breach of contract. I trust that you will wire or call me immediately upon receipt of this letter and advise of your intention to complete delivery under the terms of the order, so that it will not be necessary to proceed with the said suit."



(Testimony of Edward N. Howell, Sr.)

Mr. Andersen: Q. Now, in any other conversations with Mr. Bennett, did you discuss with him the necessity and desirability of getting this cut lumber or cut stock from any source?

A. We would have accepted it from any source—— [44]

Mr. Carlton: We move to strike that as not responsive.

The Court: It may go out, it is not responsive.

Mr. Andersen: Q. The question is, did you discuss that with him?

A. What is that now?

Q. In any other conversation with Mr. Bennett, did you discuss with him the necessity of you getting this cut stock from any source?

A. Yes, we would have accepted it from any source.

Q. Generally what were your conversations with Mr. Bennett along that line?

A. All our conversations were along the line of getting these materials delivered to us because we were in dire need of them. From September to December 30th is the peak of our door building season, and it is too late to do anything else unless we have some source or it is not delivered somewhere else.

Q. Now did you have any conversations with Mr. Rygel during that time regarding—and I guess this would be telephone conversation—regarding increases in price?

A. No, I don't think that Mr. Rygel mentioned anything about increases in price.

(Testimony of Edward N. Howell, Sr.)

Q. At or about that time?

A. All that came in this letter from Mr. Bennett. Mr. Andersen: From Mr. Bennett. That is all [45]

### Recross Examination

Mr. Carlton: Q. Mr. Howell, in connection with receiving a letter from Mr. Bennett in which he said that the market was up on lumber, do you recall that Bennett told you over the telephone that he could acquire either in lumber form or cut stock form this order for you, the unfilled portion for you, in Portland or in that vicinity?

A. No, indeed, he did not. We would have taken it.

Q. And do you recall Mr. Bennett told you over the phone, as well as writing you, that he told you if you insisted on Dunsmuir Lumber Company cutting it that the fir market was up in that region and the lumber would cost you more?

A. If he said that in a letter, it is in there.

Q. Regardless of a letter, didn't he tell you that in a conversation?

A. That we would have to pay more for the cut stock?

Q. No. Did you not tell Bennett that you insisted on Dunsmuir Lumber Company cutting that stock, that you weren't going to get it that way?

A. No. We insisted on them cutting that stock, I didn't say we wouldn't take it.

Q. Didn't Bennett tell you in that telephone conversation that fir was up in the Dunsmuir region and it would cost more there, but it could be acquired

(Testimony of Edward N. Howell, Sr.)

at comparable prices to the contract in the immediate vicinity of Portland, including [46] Washington?

A. No. There would be no reason for me to not take it. We wanted lumber. That is all we wanted was cut stock.

Q. I want to ask you just preliminarily another question: Did you not tell Rygel in your conversation with him——

Mr. Andersen: Could I have the date?

Mr. Carlton: Yes. In late September or early October of 1950, did you not tell Rygel that you had just gotten five cars of lumber of the types involved here at a better price and just as good quality?

A. No, I didn't.

Q. You told him you had gotten five cars of lumber?

A. Told him we had purchased five cars of lumber not too far from him.

Q. And didn't Rygel then tell you why not get it yourself and send it to him and he would mill it at cost?

A. No, I didn't, I took no part in buying lumber for his contract.

Q. Now, Rygel told you he couldn't fulfill the rest of the order, that he didn't have the lumber?

A. He said he wasn't going to fulfill the rest of it.

Q. He told you he wasn't going to fulfill the rest of the order?      A. That is what he said.

Q. That is what he told you over the telephone?

A. That is right, that he had been a lawyer for thirty years [47] and he could get out.

(Testimony of Edward N. Howell, Sr.)

Q. And he told you he wasn't going to fulfill it?

A. That is right.

Q. And didn't you tell Rygel that you had investigated and found out he was a responsible concern and you were going to make him ship that lumber or he was going to have a lawsuit?

A. I don't recall saying those words at all.

Q. Now I understood your former testimony to be that the reason you could not accept lumber as distinguished from cut stock and rip it up back at Pennsylvania was because you had other functions for your plant to perform in cutting, is that right?

A. I said we were running to capacity on these machines that would do that work.

Q. Now you told us that you purchased five cars of lumber of this quality——

A. I didn't say this quality, I beg your pardon.

Q. Well, in lengths of this general type?

A. I said we purchased five cars of lumber which we did not accept.

Q. But for delivery back at Pennsylvania, to your plant at Pennsylvania?

A. That is right.

Q. And it was to be ripped and sawed back there?

A. For doors, for other models, not that model.

Q. And it proved that that lumber was unacceptable to you and you rejected it, didn't you?

A. That is right.

Q. Then why could you not have accepted the lumber to fulfill this contract and use those machines, since you had repudiated those five cars?

Mr. Andersen: I object to that as argumentative.



(Testimony of Edward N. Howell, Sr.)

The Court: Overruled.

A. We only manufacture one quality door and one quality material.

Mr. Andersen: May I have that go out, please, for the purpose of the objection?

The Court: The objection is overruled.

Mr. Carlton: What was the answer? I didn't hear it.

A. We don't accept inferior lumber for one door and better lumber for another.

Mr. Carlton: Q. I know, but you had five cars of lumber back there that you had accepted——

A. We didn't have five cars. They shipped one car and we refused that and cancelled the other five cars, so we never had those five cars.

Q. Your contention is here there was six to seven cars to come out of this order that was unfilled, is that correct?

A. That is right, but each car of cut stock, let me inform you, is equivalent to about two cars of lumber. [49]

\* \* \* \* \*

## MOTION FOR DISMISSAL

Mr. Carlton: Pursuant to Rule 41(b) of the rules of civil procedure, we move for a dismissal of this action under the facts developed by the plaintiff in this case, that no cause of action or case is stated, predicated upon the provisions of the document entitled Plaintiff's Exhibit 1, which in two places has this statement: "It is understood and agreed that any



unshipped portion of this contract may be cancelled at any time without cost to us.”

The Court: What have you got to say to that, Mr. Andersen? The testimony of your last witness was to the effect that Mr. Rygel—is that his name—Rygel told him in September or October that he wasn’t going to fill the order.

Mr. Andersen: Well, in the first place I don’t think that this was very important; after discussing that with the Court I may ask leave to reopen the case for just a moment for a little piece of evidence that will take care of that. But as I read this, I think it falls under the general rule that a matter which is printed in a contract is superceded by written matter, is one answer to it.

The Court: There is no conflict between the two here.

Mr. Andersen: I beg your pardon? [68]

The Court: There is no conflict between the two here.

Mr. Andersen: This is a contract——

The Court: There is no conflict between the printed part and the typewritten part.

Mr. Andersen: We don’t say there is necessarily a conflict, but on the second page your Honor will observe under the word “terms”, forgetting the discount, it says, “The prices on this order are firm. Quantity of cars can be increased or decreased as required in cooperation with the manufacturer.”

The printed section here, we look at in two ways: First, that it is simply a provision reserved for The Commander Door Company, reserved by them, The

Commander Door Company, and, secondly, that it would read—the printed portion is read out of the contract by virtue of the fact that the language on the second page refers to an absolute firm commitment, which would be inconsistent with the cancellation of the contract.

The Court: It says, “Prices are firm.”

Mr. Andersen: Yes, “the prices on this order are firm.”

The Court: There is no ambiguity. You can read that and say the contract can be terminated or cancelled, but that the prices are firm until it is cancelled.

Mr. Andersen: And then we have the third line there referring to a decrease or increase with respect to the order as a whole, in cooperation with the manufacturer. We look at that both ways, your Honor: First, that the printed language, [69] “It is understood and agreed that any unshipped portion of this contract may be cancelled at any time without cost to us,” any part of the contract at all as finally signed, was simply for the benefit of the Commander Door Company, as one basis, and, secondly, that the language that I read from the second page reads the printed matter out. If there is any question about it, we would like to reopen the case to show this, may it please the Court: That this is the second order placed with the company; the first order for identically the same material was not firm—these people use the word “firm”. So when we sent the first order they turned it down on the basis that it was not what they call a firm order, and then we had a letter from them in which they say, “We are not going to engage in

business with you if things can be cancelled if prices go up and down.”

Then, pursuant to that letter, which we have, this letter was sent. In other words, this order here involves one previous order, plus one previous letter, all of which have to be read together.

The Court: But, Mr. Andersen, the difficulty is this, the “firm” relates to prices.

Mr. Andersen: And also the quantities.

The Court: No.

Mr. Andersen: Can we introduce the letter——

The Court: You can’t vary a contract by some parol understanding.

Mr. Andersen: That is correct. [70]

The Court: The only thing is, does this provision apply both ways?

Mr. Andersen: I think with the other two documents the Court can see——

The Court: How can you get the other two documents in, if they would vary the terms of this express order?

Mr. Andersen: They would not, your Honor, they would simply be explanatory of it.

The Court: I don’t see any occasion for anything explanatory. It seems to me if you attempt to interpret this word “firm” as applying to quantity as well as to price, you are varying the express terms of this order, because the word “firm” applies to price and not quantity.

(Further argument.)

The Court: Well, I am disposed to agree with you,

Mr. Carlton, on your position. However, I want Mr. Andersen afforded an opportunity to look up any law that he believes will sustain his position, and also I am going to reopen the case to permit him to make his offer of additional testimony. One-thirty.

(Thereupon an adjournment was taken until 1:30 o'clock P.M. this date.)

Monday, April 23, 1951—1:30 O'Clock P.M.

Afternoon Session

The Clerk: Number 6410, Commander Door, Inc., vs. Dunsmuir Lumber Company.

Mr. Andersen: On the reopening, may it please the Court, we have entered into one or two stipulations——

The Court: I think you can just make your offer now without calling the witness. State what you expect to prove by whoever you do recall.

Mr. Andersen: We will prove that Mr. T. D. Bennett, whose name has been mentioned here, during all the times mentioned was a representative of the defendant company; secondly, that the final shipment under the order was made September 18th of 1950, and that is important in the light of certain correspondence which was written after the signing of the order of March 3rd, which is Plaintiff's Exhibit Number 1.

I will offer in evidence, then, a letter by Mr. Bennett dated February 10th which precedes the order, may it please the Court.

The Court: Those should be marked for identification.



Mr. Andersen: Then I will offer the letter of September 30 as Plaintiff's Exhibit next in order.

The Clerk: For identification?

Mr. Andersen: For identification. [72]

The Court: For identification.

(Letter from T. D. Bennett to Ed Howell, Commander Door Company, Inc., dated September 30, 1949 was marked Plaintiff's Exhibit Number 8 for identification.)

PLAINTIFF'S EXHIBIT No. 8

[For Identification]

[T. D. Bennett Letterhead]

Mr. Ed Howell

Sept. 30, 1949

Commander Door Co., Inc.

48 Howell Avenue

Holmes, Pennsylvania

Dear Mr. Howell:

I have been supplying several overhead door manufacturers and industrials, and would appreciate an opportunity to quote on your requirements.

In this connection, I directly represent the Rygel Fir Manufacturing Co. of Dunsmuir, Calif., and am specializing in industrial cut stock for them. Rygel is a large modern plant with the latest type machinery and dry kilns, and equipped to manufacture any wood product from glued-up core stock to lumber in both Fir and Pine.

Rygel overhead door stock is produced from fine old growth close grained soft textured Fir. It is remarkably easy to work—there is no loss in manufacturing. Your requirements are shipped in S2S



## Plaintiff's Exhibit No. 8—(Continued)

blanks cut to exact size. Freight is saved because there is no waste on your end. Each piece is No. 1 cut stock.

I have seen some of the lumber shipped as overhead door stock, and can understand many of your problems. Not even an inspection certificate will protect the buyer from hard texture and checks—you must rely on the mill.

All orders would be placed with the mill, confirmed by the mill, and the mill would invoice you direct.

I shall look forward to hearing from you, Mr. Howell, as I am confident that you will be more than satisfied with the stock, the mill and the manner in which this business is conducted.

Cordially yours,

/s/ TED BENNETT

TDB:b—cc/Rygel

Note: Should you desire personal references, do not hesitate to contact the following:

Mr. Austin Minnich, Austin Supply Co., Philadelphia, Penna.

Messrs. William (or) Herman Meyle, Independent Pier Co., Phila.

Mr. Watson Malone, Watson Malone & Sons, Phila.

Messrs. Parke Bentley (or) Wm. Young of Wm. M. Young Co., Chester, Penna.

Mr. Robert Kelly, Attorney, Packard Bldg., Phila.

Mr. *Carlson*: What is the date of that?

The Clerk: That is September 30, 1949.

Mr. Andersen: The next letter that I would offer in evidence, and offer it for identification, is the letter of February 10th by Mr. Bennett to the plaintiff in which— that letter in your Honor's hand is only important to show that Mr. Bennett represents the defendant.

The next letter I would offer in evidence and offer for identification is a letter dated February 10th from Mr. Bennett to the Plaintiff company, and from which I will read the relevant portion to the Court, rather than have the Court read the entire letter, and that is the second paragraph:

“In your letter”—which refers to a letter of January 24th—“you mentioned ordering your requirements starting the middle of March. However, Rygel Fir must set up their factory schedule against firm orders now. Should you want to schedule only two cars per month to start while you use up some of your inventory, I feel sure it would be all right with Mr. Rygel.”

Then at the bottom of the letter in handwriting is a paragraph, “Rygel can commit all his production for the entire [73] year right now, but will wait until I hear from you.”

(Letter from T. D. Bennett to Edward N. Howell, dated February 10, 1950, was marked Plaintiff's Exhibit Number 9 for identification.)

**T. D. BENNETT  
LUMBER**

Domestic - Export  
Commission - Representation

Sherlock Building  
Portland 4, Oregon

Capitol 5858

February 10, 1950

1-15 2 Cars April  
2 Cars May  
2 Cars June  
2 " July

9.06  
675-  
904  
Len 37-  
10 days  
aft Carl Low

Mr. Edward N. Howell  
THE COMMANDER DOOR, INC.  
Holmes, Pennsylvania

2 Cars Aug.  
3 " Sept.  
4 " Oct.  
4 " Nov.  
4 " Dec.  
No. 6410  
RFFS  
C. W. Culbreth, Jr.  
Seattle, Wash.

Dear Mr. Howell:

I appreciated your letter of January 24th with reference to scheduling a large part of your cut stock requirements with Rygel Fir. Mr. Rygel advised me by telephone this morning that his factory will resume operation March first. Consequently, we must have your orders on hand by return air mail in order to fit your requirements in with the factory production schedule. Rygel Fir can ship you one car per week throughout the year. Should you require occasional cars such as requested in yesterday's wire to me and to Rygel, same could be shipped after the plant resumes operation.

In your letter you mentioned ordering your requirements starting the middle of March. However, Rygel Fir must set up their factory schedule against firm orders now. Should you want to schedule only two cars per month to start while you use up some of your inventory, I feel sure it will be all right with Mr. Rygel.

Your reply by return air mail is required in order for this production to be held for you.

Kindest regards.

Cordially yours,

*T. D. Bennett*

T. D. Bennett

TDB:mv

cc: Rygel Fir Manufacturing Co.

*Wk: I could not do anything on your wire because the door (house) plants are paying up to \$100/y for this same stock. I can get stiles to exact length but at 260 y. Rygel called me when he received your wire direct but they are not yet in production. He will be our best bet. One of the mills offers C 18th KD 525 at 175. 3045 days Mill*

*Rygel can commit all his attention to the entire stock now but will wait until I hear from you. So give the order in prompt attention.*



$$\begin{array}{r} c \ b \ 2 \\ - \ 4 \ 1 \\ \hline 1 \ 9 \ 1 \end{array}$$

1 1/2 5/4 x 6' x 8" S&S to 1 2/3  
 This 1500.00 ft full in  
 net 5 can cut steel  
 1 2/3 stock. to make the can  
 shipment to be made with  
 Pm on 1915 Jms Helms

1 1/2 cans cut steel S&S to 9.06  
 1 1/3 cut steel A

6 can cut steel B 6.75

To L Oams, Jr  
 Terms 30% 10 days after date  
 when bill is due









Mr. Andersen: I next offer in evidence a letter of February 23rd of 1950, which I now offer for identification, a letter by Mr. Bennett to the Plaintiff Company. I will just read the relevant portions of it, if the Court please.

The Court: All right.

Mr. Andersen: "It was also my impression that you wanted a fixed price for the entire year so as to accurately set your door prices and feel sure in accepting future business."

And then again, "The industry expects a very good year and prices are very firm for the next five months. Consequently, there are lots of contract orders available. Rygel knows that two other concerns have asked me to set up a contract for his stock, but I told you that I would work with you, and, therefore, your requirements come first."

(The document referred to was marked Plaintiff's Exhibit Number 10 for identification.)

PLAINTIFF'S EXHIBIT No. 10

[T. D. Bennett Letterhead]

Mr. Edward N. Howell  
Commander Door, Inc.  
Holmes, Pennsylvania

Feb. 23, 1950

Dear Mr. Howell:

I have today received a copy of Mr. Rygel's letter of the 20th to you. I tried to contact you by telephone but understand that you would be out of town until Monday.

When you telephoned me (February 15) you stated

## Plaintiff's Exhibit No. 10—(Continued)

that you would like to get the smaller of the two sets shipped from Dunsmuir at \$6.75 and that you had been paying approximately \$7.35/7.45. You did not have the list of sizes in front of you but did refer to a model 64 and 43 and advised that only two different sets had been received and that it was the smaller set. I in turn passed this information on to Mr. Rygel.

It is very regrettable that this mix-up occurred but feel sure you will find that the price of \$7.15 for the set as listed is very fair. Equalizing charges were noted in my letter of February 13th.

It was also my impression that you wanted a fixed price for the entire year so as to accurately set your door prices and feel sure in accepting future business.

Your prompt reply to Mr. Rygel covering these pertinent points will be appreciated.

Kindest regards.

Cordially,

/s/ TED BENNETT

TDB:mw—cc:Rygel

Note: We could have caught this if you had given me the amount of pieces in this set. However, Rygel did give a very fair price at \$7.15 as you will find upon checking end lumber costs. Be sure you give his letter your prompt attention—possibly call him. The industry expects a very good year and prices are very firm for the next five months. Consequently, there are lots of contract orders available. Rygel



## Plaintiff's Exhibit No. 10—(Continued)

knows that two other concerns have asked me to set up a contract for his stock but I told you that I would work with you, and therefore your requirements come first. T.D.B.

[In longhand]: I am looking forward to your visit at which time we can go over your program. Had a chance to pick up a car of MG B&Btr 6/4 KD S2S at \$145/mill today but you could not be reached. It sold at \$165.

---

Mr. Andersen: I next offer in evidence and submit it for identification next in order a letter by the Plaintiff Corporation—pardon me, a letter by the Plaintiff Corporation to Mr. Bennett, which replies to a letter of Mr. Bennett of the [74] 21st, the contents of which are not particularly relevant here, the first paragraph of which reads, “This will acknowledge”—this letter is dated July 25, 1950.

“This will acknowledge receipt of your letter of the 21st”—which is the 21st of July, which is after the order—“and to advise that our order with you and Dunsmuir Lumber company was a firm order and was not placed with you with the understanding that the prices were to be made at time of shipment.”

I will mark the paragraph for the Court's convenience.

(Copy of letter from Commander Door, Inc. to T. D. Bennett, dated July 25, 1950, was marked Plaintiff's Exhibit Number 11 for identification.)

## PLAINTIFF'S EXHIBIT No. 11

Mr. T. D. Bennett

July 25, 1950

T. D. Bennett Lumber Co.

Sherlock Building

Portland 4, Oregon

Dear Ted:

This will acknowledge receipt of your letter of the 21st and to advise that our order with you and Dunsmuir Lumber Company was a firm order and was not placed with you with the understanding that the prices were to be made at time of shipment.

I have just talked to Mr. Rygel and he advises that he refuses to make further shipments unless we accept a 7% increase on the stock he is furnishing. Inasmuch as we are committed to manufacture and deliver Commander Doors to our dealers based on the price of our firm order to you, we have no alternative but to say "go ahead". It is my understanding after talking with Mr. Rygel that he will proceed and make shipment in accordance with the schedule with doors he is to manufacture for us.

In the last car MEC 4782, there were 9,000 pieces which should have been  $31\frac{1}{2}$ " wide x  $19\frac{1}{4}$ " long. These pieces arrived  $31\frac{1}{2}$ " to  $35\frac{5}{8}$ " wide at one end tapering to  $31\frac{1}{8}$ " and  $31\frac{1}{4}$ " at the other end which makes it impossible to use any of these 9,000 pieces for the  $31\frac{1}{2}$  dimension stock. Talking to Mr. Rygel this morning, he advised us to rip these pieces to  $21\frac{1}{2}$ " wide and on his next car he would send us 9,000 additional pieces of  $31\frac{1}{2}$ " wide stock and would short us 9,000 pieces  $21\frac{1}{2}$ " wide which would equalize the two cars.

## Plaintiff's Exhibit No. 11—(Continued)

We will of course keep the time cost on ripping these 9,000 pieces and will keep it as low as possible as we realize it was an error in the shop and certainly no fault of Mr. Rygel's. When I talked to him he was very nice about the entire matter and we feel very happy that we have the association with him and yourself.

With best personal regards.

Very truly yours,

THE COMMANDER DOOR, INC.  
EDWARD N. HOWELL

h/t—cc: Dunsmuir Lumber Company.

---

Mr. Andersen: I next offer in evidence the original contract dated, and submit it—you have seen this (exhibiting to Mr. Carlton)?

Counsel has read all these letters. I had assumed that he had read the original contract.

I next offer in evidence and submit it for marking for identification a purchase order form which is typed on the same form as Plaintiff's Exhibit Number 1, the main contract in evidence—there are certain pencilled notations on it, I offer it without the pencilled notations, as simply being the original contract submitted to Mr. Rygel, and will offer [75] just the printing and typing on the contract without the pencilled notations which bear no relevance to the matter.

(The document referred to was marked Plaintiff's Exhibit Number 12 for identification.)



REFERENCE NUMBER

Revised 8-2-50

# THE COMMANDER DOOR, INC.

INCORPORATED IN CALIFORNIA

INCORPORATED IN CALIFORNIA

INCORPORATED IN CALIFORNIA

STANDARD & METRIC SIZES

DATE: February 11, 1951

PAGE 1 of 1

NO. 1234

Department: Building Department

Department: California

STANDARD & METRIC SIZES  
INCORPORATED IN CALIFORNIA  
INCORPORATED IN CALIFORNIA

NO. 1234

PLEASE MARK THE FOLLOWING:

REPLY, A.C. 200 1/2

Cut sizes: "4" each cut consisting of the following:

100 Pcs.	4'-0" x 8'-0"
100 "	4'-0" x 8'-0"
100 "	4'-0" x 8'-0"
100 "	4'-0" x 8'-0"
100 "	4'-0" x 8'-0"

STANDARD & METRIC SIZES  
INCORPORATED IN CALIFORNIA  
INCORPORATED IN CALIFORNIA

Cut sizes: "8" each cut consisting of the following:

100 Pcs.	8'-0" x 8'-0"
100 "	8'-0" x 8'-0"
100 "	8'-0" x 8'-0"
100 "	8'-0" x 8'-0"
100 "	8'-0" x 8'-0"

STANDARD & METRIC SIZES  
INCORPORATED IN CALIFORNIA  
INCORPORATED IN CALIFORNIA

The above dimensions are to be in exact lengths. Lengths 8' to 10' in 1'-0" increments, with 1/2" increments between 10' and 12'. Lengths 12' to 14' in 2'-0" increments, with 1/2" increments between 14' and 16'. Lengths 16' to 18' in 2'-0" increments, with 1/2" increments between 18' and 20'. Lengths 20' to 22' in 2'-0" increments, with 1/2" increments between 22' and 24'. Lengths 24' to 26' in 2'-0" increments, with 1/2" increments between 26' and 28'. Lengths 28' to 30' in 2'-0" increments, with 1/2" increments between 30' and 32'. Lengths 32' to 34' in 2'-0" increments, with 1/2" increments between 34' and 36'. Lengths 36' to 38' in 2'-0" increments, with 1/2" increments between 38' and 40'. Lengths 40' to 42' in 2'-0" increments, with 1/2" increments between 42' and 44'. Lengths 44' to 46' in 2'-0" increments, with 1/2" increments between 46' and 48'. Lengths 48' to 50' in 2'-0" increments, with 1/2" increments between 50' and 52'. Lengths 52' to 54' in 2'-0" increments, with 1/2" increments between 54' and 56'. Lengths 56' to 58' in 2'-0" increments, with 1/2" increments between 58' and 60'. Lengths 60' to 62' in 2'-0" increments, with 1/2" increments between 62' and 64'. Lengths 64' to 66' in 2'-0" increments, with 1/2" increments between 66' and 68'. Lengths 68' to 70' in 2'-0" increments, with 1/2" increments between 70' and 72'. Lengths 72' to 74' in 2'-0" increments, with 1/2" increments between 74' and 76'. Lengths 76' to 78' in 2'-0" increments, with 1/2" increments between 78' and 80'. Lengths 80' to 82' in 2'-0" increments, with 1/2" increments between 82' and 84'. Lengths 84' to 86' in 2'-0" increments, with 1/2" increments between 86' and 88'. Lengths 88' to 90' in 2'-0" increments, with 1/2" increments between 90' and 92'. Lengths 92' to 94' in 2'-0" increments, with 1/2" increments between 94' and 96'. Lengths 96' to 98' in 2'-0" increments, with 1/2" increments between 98' and 100'.

The 4' lengths are to be exact dimensions and square ends. 4'-0" and 4'-6" lengths may be cut to 4'-0" but not less than 4'-0". The 8'-0" lengths are to be exact dimensions and square ends. 8'-0" and 8'-6" lengths may be cut to 8'-0" but not less than 8'-0". The 12'-0" lengths are to be exact dimensions and square ends. 12'-0" and 12'-6" lengths may be cut to 12'-0" but not less than 12'-0". The 16'-0" lengths are to be exact dimensions and square ends. 16'-0" and 16'-6" lengths may be cut to 16'-0" but not less than 16'-0". The 20'-0" lengths are to be exact dimensions and square ends. 20'-0" and 20'-6" lengths may be cut to 20'-0" but not less than 20'-0". The 24'-0" lengths are to be exact dimensions and square ends. 24'-0" and 24'-6" lengths may be cut to 24'-0" but not less than 24'-0". The 28'-0" lengths are to be exact dimensions and square ends. 28'-0" and 28'-6" lengths may be cut to 28'-0" but not less than 28'-0". The 32'-0" lengths are to be exact dimensions and square ends. 32'-0" and 32'-6" lengths may be cut to 32'-0" but not less than 32'-0". The 36'-0" lengths are to be exact dimensions and square ends. 36'-0" and 36'-6" lengths may be cut to 36'-0" but not less than 36'-0". The 40'-0" lengths are to be exact dimensions and square ends. 40'-0" and 40'-6" lengths may be cut to 40'-0" but not less than 40'-0". The 44'-0" lengths are to be exact dimensions and square ends. 44'-0" and 44'-6" lengths may be cut to 44'-0" but not less than 44'-0". The 48'-0" lengths are to be exact dimensions and square ends. 48'-0" and 48'-6" lengths may be cut to 48'-0" but not less than 48'-0". The 52'-0" lengths are to be exact dimensions and square ends. 52'-0" and 52'-6" lengths may be cut to 52'-0" but not less than 52'-0". The 56'-0" lengths are to be exact dimensions and square ends. 56'-0" and 56'-6" lengths may be cut to 56'-0" but not less than 56'-0". The 60'-0" lengths are to be exact dimensions and square ends. 60'-0" and 60'-6" lengths may be cut to 60'-0" but not less than 60'-0". The 64'-0" lengths are to be exact dimensions and square ends. 64'-0" and 64'-6" lengths may be cut to 64'-0" but not less than 64'-0". The 68'-0" lengths are to be exact dimensions and square ends. 68'-0" and 68'-6" lengths may be cut to 68'-0" but not less than 68'-0". The 72'-0" lengths are to be exact dimensions and square ends. 72'-0" and 72'-6" lengths may be cut to 72'-0" but not less than 72'-0". The 76'-0" lengths are to be exact dimensions and square ends. 76'-0" and 76'-6" lengths may be cut to 76'-0" but not less than 76'-0". The 80'-0" lengths are to be exact dimensions and square ends. 80'-0" and 80'-6" lengths may be cut to 80'-0" but not less than 80'-0". The 84'-0" lengths are to be exact dimensions and square ends. 84'-0" and 84'-6" lengths may be cut to 84'-0" but not less than 84'-0". The 88'-0" lengths are to be exact dimensions and square ends. 88'-0" and 88'-6" lengths may be cut to 88'-0" but not less than 88'-0". The 92'-0" lengths are to be exact dimensions and square ends. 92'-0" and 92'-6" lengths may be cut to 92'-0" but not less than 92'-0". The 96'-0" lengths are to be exact dimensions and square ends. 96'-0" and 96'-6" lengths may be cut to 96'-0" but not less than 96'-0". The 100'-0" lengths are to be exact dimensions and square ends. 100'-0" and 100'-6" lengths may be cut to 100'-0" but not less than 100'-0".

The Commander Door

This Copy must be signed and marked in order to have priority before shipping date.

THE COMMANDER DOOR, INC.

Signed by

*[Signature]*  
Director of Production

Ship in packages, Re. L.C.L. (Aerial Freight) Carried, 8-2-50







I think that should read, "The prices quoted are firm," to make sense out of it.

" 'However, with general market conditions are lower, prices are to be adjusted.' "

That probably means, to paraphrase it, that market conditions may be adjusted. That is what is stated on Exhibit 12, may it please the Court.

"This is not my agreement with you, if you desire to discuss prices every sixty or ninety days, I am willing to discuss the prices, but I will not stand firm on an up market and reduce on a down market, so that paragraph will have to be changed, either by having the following, 'The price is quoted firm for the year,' or, 'Prices to be based upon general market conditions every sixty or ninety days' as decided upon."

And the next paragraph: [77]

"I should be pleased to enter into the contract with you, based upon the above conditions, but I cannot under any circumstances cut Style "B" fifty per cent less than Style "A", because there is only five feet less than Style "A", which means, there being 41.59 feet in Style "A", five feet would be  $\frac{1}{8}$  or  $12\frac{1}{2}$  per cent less, in lumber only the cost of lumber in manufacturing Style "A" and "B" are exactly the same, there are the same number of different sized lengths and widths, the only difference is five feet more than Style "B". I trust that you will understand this fully, and do not think that I am hedging, but I assure you at the time that I figured the price of Style "B" it was based upon the amount of 26 feet per set, and not 35.98 feet per set. Kindly

advise me at once as to your wish in the matter as I wish to make my commitments for the year, and if you find that you cannot handle the same, and wish to cancel the entire order, you may use your judgment, as I find that there are half a dozen different firms who are most anxious for me to manufacture for them, but I have been pleased with the association of your company and would be pleased to continue the same for the coming year. Please advise me at once as [78] to your pleasure. I also note,"—

Well, the rest is not important to the question.

(Letter from Dunsmuir Lumber Company to Commander Door, Inc., dated February 20, 1950, was marked Plaintiff's Exhibit Number 13 for identification.)

# PLAINTIFF'S EXHIBIT No. 13

[Dunsmuir Lumber Co. Letterhead]

[Pencilled figures in margin]: \$7.37      \$7.00

46.49 A	9.67	9.66
---------	------	------

35.20 B	.60	.60
---------	-----	-----

11.29 Differ	9.05	.60
--------------	------	-----

Commander Door, Inc.

Feb. 20, 1950

Holmes, Pa.

Att.: R. A. Howell

My dear Mr. Howell:

I have this date received your letter of February 17th containing order No. 2107 for the cut stock, sixteen cars A and six cars B. In going over your

## Plaintiff's Exhibit No. 13—(Continued)

B Style I find that when I made the price to you of \$6.75 per set delivered I had in mind a specification from the American which was as follows:

1 Piece 1-13/32 x 37/8 x 96"	
1 Piece 1-13/32 x 53/8 x 96"	2.60 M
6 Piece 1-13/32 x 25/8 x 96"	

This set amounts to 26 ft., and I quoted the price of \$6.75 for that set, now, I notice that your Style B consists of:

1 Piece 1-13/32 x 47/8 x 8'	
1 Piece 1-13/32 x 31/2 x 8'	
4 Piece 1-13/32 x 21/2 x 8'	
9 Piece 1-13/32 x 31/2 x 251/2"	2.17 M
6 Piece 1-13/32 x 21/2 x 251/2"	

This makes a total of 35.98 ft., this compares with Style A of 41.59 ft., in other words, there is less than 6 ft. difference between the A and the B, my price on the A was \$9.65 per set delivered plus equalizing charge of \$7.30 per thousand pieces, now then, in respect to Style B, the very closest price that I can

[In pencil]: 7.00

figure on Style B would be \$7.15 per set delivered plus equalizing charge of \$7.30 per thousand pieces, and if you do not desire the equalizing of the 8 ft. lengths then that would be omitted, however, \$7.15 is the very best price that I can make on the B Style, and if this does not meet with your approval then I suggest you cancel that. In respect to Style A, you have requested in the past of having this equalized,



## Plaintiff's Exhibit No. 13—(Continued)

my price was, as I said, \$9.65 for that set plus the equalizing charge, my new price for that set to you is \$9.06 per set delivered plus the equalizing charge, I do not make any money on this equalizing charge as it is labor, and if you do not wish it equalized then the set will be \$9.06 per set delivered.

[Printer's note: The balance of Plaintiff's Exhibit No. 13 was read into the record.]

---

Mr. Andersen: I offer—I have taken the liberty on all these letters to put a little mark on the margin to direct the Court's attention to the matters I think important. Of course, there may be other matters in there of importance, too, but I don't believe there are.

And then the letter written by Mr. Bennett to the plaintiff company, which I will offer for identification as Plaintiff's Exhibit Number 14, in which they refer to exhibit number—the one on that yellow letter——

The Clerk: That is Number 11.

Mr. Andersen: What date, July 25?

The Clerk: Yes.

Mr. Andersen: In which Mr. Bennett refers to Plaintiff's Exhibit for identification Number 11, in which Mr. Bennett, speaking for the lumber company says, quote, "With reference to this being a firm order. My discussions with the mill and subsequent representations to you were to that effect."

(Letter from T. D. Bennett to Edward N. Howell, dated July 27, 1950 was marked Plaintiff's Exhibit No. 14, for identification.) [79]

## PLAINTIFF'S EXHIBIT No. 14

[T. D. Bennett letterhead]

Mr. Edward N. Howell  
The Commander Door, Inc.  
Holmes, Pennsylvania

July 27, 1950

Dear Ed:

I am in receipt of your letter of the 25th. Mr. Rygel telephoned me that you were in communication with him and that the mill will proceed with your shipments.

With reference to this being a firm order. My discussions with the mill and subsequent representations to you were to that effect. However, your initial order of February 17th stated: "The price quoted is firm. However, when general market conditions are lower, prices are to be adjusted." This order was not acceptable and was returned. I do not have a copy of the present order in my office.

As stated in our telephone conversation, normal increases were to have been absorbed and the mill has done so. However, not only labor insisted upon a larger than average increase but everything else including the Forest Service increasing timber under contract necessitated this request for an increase. As previously pointed out, the mill absorbed this loss as long as possible but it finally resolved itself to either getting an increase or shutting that plant down. You cannot continue to operate at a loss. Frankly, all Mr. Rygel expects the plant to do is break even on your orders.

Your co-operation and understanding in this respect was necessary and appreciation will be evi-

## Plaintiff's Exhibit No. 14—(Continued)

denced by prompt shipments and any other service which can be rendered.

The narrow shorts contained in MEC 4782 are a surprise to me because all stock is ripped and cut to size by the same operators as in the past. However, there has been a recent change in supervision which may account for same. I cannot understand how all can be narrow, so please check each piece before ripping to  $2\frac{1}{2}$ ".

I am still expecting you next week. Please let me know what day that will be.

Kindest personal regards.

Cordially,

/s/ TED BENNETT

TDB:mw—cc.: Dunsmuir Lumber Co.

[In longhand]: I have an idea on your house doors and will cover same during your visit—B.

---

Mr. Andersen: I also wish to prove on this offer of proof, may it please the Court, that in all conversations held between my client and the defendant company, that all discussions were had in the light of this contract being a non-cancellable contract as to any quantities to be shipped.

I also would prove through the testimony of Mr. Rygel that the order would not have been accepted had it not been a firm order, requiring all of the order or cut in stock, as it is called, on the order to be shipped.

Now, just by way of a brief argument—

The Court: Well, before you go into any kind of argument:

Now, this offer has been made. Your objection?

Mr. Carlton: Yes. The objection is, it is incompetent, irrelevant, and immaterial, not within the issues, seeking to vary the terms by parol of an instrument in writing, with a clear instrument in writing stating in two places as to the right of cancellation, and none of the writings can dispute or otherwise affect the final memorial contract which was stipulated between the parties here was the contract.

The Court: The objection is sustained.

Mr. Andersen: May I argue it briefly?

The Court: Yes.

(Argument.)

The Court: Well, as I view it, when the Court has presented to it a question of interpretation of a contract, [80] the first question the Court must answer is, Is there any uncertainty or ambiguity in this contract? If there is not, the parol evidence rule precludes us from considering any negotiations, written or oral, which preceded the entering into of the formal contract.

The Court cannot make contracts for people. They make them for themselves.

Now if it does not express the intent and purpose of the parties and it is not ambiguous, then the remedy is by reformation, if equitable grounds for reformation be present; but if, as I view it here, you have a contract that is not ambiguous—the two provisions you mention to me are readily reconcilable, the order was firm as to price, with the printing very clearly providing that it cannot be cancelled as to any unfilled part of the order, so I see nothing ambiguous in



the contract, and if there is no ambiguity the parol evidence rule precludes me from receiving any evidence which would have a tendency to vary the terms of that agreement.

Now, I understand you rest?

Mr. Andersen: As to the first cause of action.

The Court: As to the first cause of action?

Mr. Andersen: Yes.

The Court: And you renew your motion?

Mr. Carlton: I renew my motion.

The Court: I am constrained to dismiss your first cause [81] of action, and that is the order.

Mr. Andersen: All right, your Honor. Would you take the stand?

The Court: The second cause relates to——

Mr. Andersen: Just the freight refund, your Honor. It only involves \$300.00 odd dollars.

\* \* \* \* \*

[Endorsed]: Filed August 23, 1951.

---

[Endorsed]: No. 13074. United States Court of Appeals for the Ninth Circuit. The Commander Door, Inc., a corporation, Appellant, vs. Dunsmuir Lumber Co., a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed August 23, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.



In the United States Court of Appeals  
for the Ninth Circuit

No. 13074

THE COMMANDER DOOR, INC., a corporation,  
Plaintiff and Appellant,

vs.

DUNSMUIR LUMBER CO., a corporation,  
Defendant and Appellee.

STATEMENT OF POINTS UPON WHICH  
APPELLANT INTENDS TO RELY

Appellant intends to rely upon the following points upon the appeal herein:

1. That the trial court erred in entering judgment for defendant.
2. That the trial court erred in holding that the contract (Exhibit 1) barred a recovery by plaintiff.
3. That the trial court erred in refusing plaintiff's offer of proof, the offer of proof being directed to show that the printed words on Exhibit 1, "It is understood and agreed that any unshipped portion of this contract may be cancelled at any time without cost to us," were in fact not a part of the contract and had, by the agreement of plaintiff and defendant, been rendered valueless, of no meaning, and no part of the contract.
4. That the trial court erred in holding that the language quoted in specification 3 could not be ex-

plained, and thereby rendered meaningless by the previous and subsequent acts and declarations of the parties.

GLADSTEIN, ANDERSEN &  
LEONARD,

/s/ By GEORGE R. ANDERSEN,  
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed] : Filed Sept. 17, 1951. Paul P. O'Brien,  
Clerk.



No. 13,074

IN THE

United States Court of Appeals  
For the Ninth Circuit

---

THE COMMANDER DOOR, INC. (a corporation),

*Appellant,*

VS.

DUNSMUIR LUMBER Co. (a corporation),

*Appellee.*

APPELLANT'S OPENING BRIEF.

---

GLADSTEIN, ANDERSEN & LEONARD,  
240 Montgomery Street, San Francisco 4, California,  
*Attorneys for Appellant.*

FILED

NOV 20 1951

PAUL P. O'BRIEN  
CLERK





## Subject Index

---

	Page
Jurisdiction .....	1
Introductory statement .....	2
Statement of the case .....	4
Specification of errors .....	7
Argument .....	8
A. The applicable California statutes .....	8
B. The letters written subsequent to the date of the order (Plaintiff's Exhibit 1, Tr. 24): (a) Show the intention of the parties with relation to the wording of the order; and (b) constitute a subsequent written agreement between the parties altering such wording	11
C. By their acts and conduct the parties recognized the order or contract as a firm order for the quantity of lumber ordered, and such acts and conduct, including letters, are admissible to explain the contract.....	12
D. The printed language referred to, if operative at all, was for the benefit of plaintiff only .....	16

## Table of Authorities Cited

---

<b>Cases</b>	<b>Pages</b>
Loomis F. G. Assn. v. California F. Exch., 128 Cal. App. 265 .....	14
Mitau v. Roddan, 149 Cal. 1 .....	15, 16
Rosenberg v. Moore, 194 Cal. 392 .....	15
Texas Co. v. Todd, 19 Cal. App. (2d) 174 .....	11, 15, 16

## Statutes

Civil Code:	
Section 1651 .....	10
Section 1647 .....	9
Section 1698 .....	9, 11
Code of Civil Procedure:	
Section 1856 .....	9
Section 1860 .....	9
Section 1864 .....	10
28 U.S.C.A. 1332 .....	2

## Texts

12 Am. Jur. p. 789 .....	14
Cal. Jur. 10-Year Supp., p. 133 .....	13
Cal. Jur. 10-Year Supp., p. 160 .....	11

No. 13,074

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

---

THE COMMANDER DOOR, INC. (a corporation),

*Appellant,*

vs.

DUNSMUIR LUMBER CO. (a corporation),

*Appellee.*

---

**APPELLANT'S OPENING BRIEF.**

---

**JURISDICTION.**

On November 6, 1950, plaintiff and appellant, Commander Door, Inc., commenced this action in the United States District Court for the Northern District of California, Northern Division (at Sacramento, California), against Dunsmuir Lumber Co., a corporation. The action was for approximately \$21,000 damages for breach of contract to sell cut lumber to the plaintiff.

Jurisdiction in the United States District Court at Sacramento was had over the defendant for the reason that the plaintiff is a foreign corporation and the

defendant is a California corporation, and the amount in controversy exceeded \$3,000. (28 U.S.C.A. 1332.) The fact of diversity was not questioned, nor was it an issue at the trial.

---

### **INTRODUCTORY STATEMENT.**

The complaint sets forth two causes of action, the first being for damages for breach of contract as above stated, and the second count seeking return of certain freight overcharges. Judgment was rendered for the defendant on the first cause of action, and for the plaintiff on the second cause of action. The appeal is from the judgment entered in favor of defendant on the first cause of action.

The gravamen of the first cause of action is that on March 3, 1950, the parties entered into a contract for certain cut lumber; that after a portion of the lumber was shipped, the defendant breached the contract in failing and refusing to ship the balance of cut lumber sufficient to make 5350 doors; and that as a result thereof plaintiff sustained damage in the sum of \$21,400.

The answer to the first cause of action admitted entering into the contract; denied that the balance of the order would amount to 5350 doors; denied plaintiff suffered any damage; alleged that defendant had the right to cease shipments because plaintiff had not paid for lumber actually shipped within certain time limits; alleged that it (defendant) did not have lumber avail-

able to ship to the plaintiff due to shortages, but also alleging that other lumber was available to plaintiff; alleged that under the terms of the contract defendant had the right to cancel any unshipped portion at any time; alleged as a further defense that as labor costs went up, defendant required, as a condition to further shipment of lumber, that the contract price be increased; and further alleged that it would have shipped cut lumber if the lumber had been available to it and if plaintiff would pay the increased charges.

The contract sued upon (Tr. 24) contains in fine print the following language:

“It is understood and agreed that any unshipped portion of this contract may be cancelled at any time, without cost to us.”

The trial court took the position (Tr. 62-65) that the above language was applicable to both parties and could not be either read out of the contract or its true meaning explained by other evidence. The court further refused plaintiff's offer to prove that by subsequent agreement of the parties the clause was eliminated from the contract.

At the trial plaintiff offered evidence to show;

(a) That said provision, if effective, was only for the benefit of the plaintiff;

(b) That the printed language above quoted was superseded and rendered inoperative by virtue of the following typewritten provision of the contract: “The prices on this order are firm.”



(c) That the parties by their acts, conversations, conduct and subsequent letters had cancelled the printed clause quoted, creating a non-cancellable contract.

(d) That by virtue of the foregoing, the contract was a firm non-cancellable contract calling for the delivery and purchase of all cut lumber set forth in the contract.

---

#### STATEMENT OF THE CASE.

The plaintiff is a manufacturer of doors in Philadelphia, Pennsylvania. The defendant operates a lumber company in Dunsmuir, California.

After preliminary negotiations, plaintiff prepared and forwarded a contract (Pl. Exh. 12 for Id., Tr. 76)<sup>1</sup> to the defendant company on February 17, 1950.

That contract was not satisfactory to the defendant, as it contained a provision for the adjustment of prices and was therefore not a firm order. The defendant, writing a letter to plaintiff (Exh. 13 for Id., Tr. 79), in reference to the proposed contract of February 17, 1950, stated:

“I further discussed with you the question of price, and stated if you desire to have a firm price I would make a firm price and if lumber goes up you don't pay any more, and if the price of lumber goes down the price will be exactly the same,

---

<sup>1</sup>The pencil marking on the second page was not offered in evidence, but only the typed portion.

but I notice in your order on page 2 'The price is (sic) quoted are firm. However with (sic) general market conditions are lower, prices are to be adjusted.' *This is not my agreement with you*, if you desire to discuss prices every sixty or ninety days, I am willing to discuss the prices, but I will not stand firm on an up market and reduce on a down market, so that paragraph will have to be changed, either by having the following, 'The price is quoted firm for the year,' or 'Prices to be based upon general market conditions every sixty or ninety days' as decided upon."

\* \* \* \* \*

"Kindly advise me at once as to your wish in the matter *as I wish to make my commitments for the year*, and if you find that you cannot handle the same, and wish to cancel the entire order, you may use your judgment, as I find that there are half a dozen different firms who are most anxious for me to manufacture for them, but I have been pleased with the association of your company *and would be pleased to continue the same for the coming year*. Please advise me at once as to your pleasure. I also note,". (Tr. 80-81; italics supplied.)

Upon receipt of that letter plaintiff prepared the contract which is the subject of this action (Pl. Exh. 1) dated March 3, 1950 (Tr. 24), in which it is stated (page 2 of the Exhibit) that "The prices on this order are firm."

Certain lumber was shipped under the contract. Thereupon a question arose as to the length of the contract and prices (Tr. 74, 84), defendant demanding

an increase in prices. Plaintiff accepted a slight increase under protest. Thereafter, beginning October 1, 1950 (Tr. 55), the defendant refused to ship any more lumber at all, unless the defendant would post a letter of credit and accept an additional increase in prices.

During the dealings between the parties letters were exchanged between them, most of these letters bearing date after March 3, 1950, the date of the contract, from which correspondence it is clear that the contract of March 3 was understood and agreed by the parties to be a binding contract at a set price for the full amount of cut lumber specified in the contract.

We refer to Exhibit 11 (for Id.), a letter from plaintiff to the defendant, dated July 25, 1950 (Tr. 74), from which we quote the following.

“This will acknowledge receipt of your letter of the 21st and to advise that *our order with you and Dunsmuir Lumber Company was a firm order* and was not placed with you with the understanding that the prices were to be made at time of shipment;

“I have just talked to Mr. Rygel and he advises that he refuses to make further shipments unless we accept a 7% increase on the stock he is furnishing. Inasmuch as we are committed to manufacture and deliver Commander Doors to our dealers based on the price of our firm order to you, we have no alternative but to say ‘go ahead.’ *It is my understanding after talking with Mr. Rygel that he will proceed and make shipment in accordance with the schedule with doors he is to manufacture for us.*” (Tr. 74; italics supplied.)

Again, the following quote from a letter written by Mr. Bennett on July 27, 1950 (Ex. 14 for Id., Tr. 84), an official of the defendant company, to the plaintiff, the letter being Exhibit 14:

“With reference to this being a *firm order*. *My discussions with the mill and subsequent representations to you were to that effect.*” (Tr. 83; italics supplied.)

These two letters, one in reply to the other, show without doubt what the agreement of the parties was; how they understood it, and how they acted under it.

The plaintiff offered to prove from the foregoing evidence and also from conversations between the parties that both parties understood the contract to be firm both as to price and quantity for the period ending December 1, 1950. (Tr. 85.) The court, however, sustained an objection to all of this evidence and excluded the referred to exhibits on the basis of the parol evidence rule. On motion of defendant a judgment of dismissal was thereupon entered on the grounds indicated.

---

#### **SPECIFICATION OF ERRORS.**

(1) That the trial court erred in entering a judgment of dismissal of plaintiff's first cause of action.

(2) That the trial court erred in holding that the contract (Exhibit 1) barred a recovery by plaintiff by virtue of the parol evidence rule.

(3) That the trial court erred in refusing plaintiff's offer of proof, the offer of proof being directed



to show that the printed words on Exhibit 1, i.e., "It is understood and agreed that any unshipped portion of this contract may be cancelled at any time without cost to us," were in fact not a part of the contract and had, by the agreement of plaintiff and defendant, been in effect deleted from the contract.

(4) That the trial court erred in holding that the language quoted in specification 3 could not be explained, and thereby rendered meaningless by the previous and subsequent acts and declarations of the parties.

(5) That the trial court erred in refusing plaintiff's offer of proof, the offer of proof being directed to show (a) that the parties understood and agreed that the order was to be a firm contract for the period involved; (b) that the parties in writing, subsequent to the date of the order (Exhibit 1), agreed that the order was firm for the period; and (c) that the original order was modified by subsequent executed oral and written agreements.

Plaintiff's offer of proof, and the evidence relied upon, is contained between pages 65 and 87 of the transcript.

---

### ARGUMENT.

#### A. THE APPLICABLE CALIFORNIA STATUTES, FOR THE CONVENIENCE OF THE COURT, ARE SET OUT AS FOLLOWS:

In applying the parol evidence rule, the court puts itself in the position of the parties as of the time of contracting.



“§1647. Contracts explained by circumstances. A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates.” (*Civil Code of California.*)

“§1860. The circumstances to be considered. For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret.” *Code of Civil Procedure of California.*

A contract in writing may be altered by a new writing or by an executed oral agreement.

“§1698. [Written contracts, how modified.] A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise.” *Civil Code of California.*

Oral evidence is not admissible except to show circumstances under which the contract was made, or to explain an extrinsic ambiguity.

“§1856. An agreement reduced to writing deemed the whole. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:

“1. Where a mistake or imperfection of the writing is put in issue by the pleadings;

“2. Where the validity of the agreement is the fact in dispute.

“But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section eighteen hundred and sixty, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties.” *Code of Civil Procedure*.

A contract is to be interpreted in the sense that the parties understood it.

“§1864. Of two constructions, which preferred. When the terms of an agreement have been intended in a different sense by the different parties to it, that sense is to prevail against either party in which he supposed the other understood it, and when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made.” *Code of Civil Procedure*.

Written or later material in a contract or order controls any printed matter in a contract.

“§1651. Contract, partly written and partly printed. Where a contract is partly written and partly printed, or where part of it is written or printed under the special directions of the parties, and with a special view to their intention, and the remainder is copied from a form originally prepared without special reference to the particular parties and the particular contract in question, the written parts control the printed parts, and

the parts which are purely original control those which are copies from a form. And if the two are absolutely repugnant, the latter must be so far disregarded." *Civil Code of California*.

---

**B. THE LETTERS WRITTEN SUBSEQUENT TO THE DATE OF THE ORDER (PLAINTIFF'S EXHIBIT 1, TR. 24): (A) SHOW THE INTENTION OF THE PARTIES WITH RELATION TO THE WORDING OF THE ORDER; AND (B) CONSTITUTE A SUBSEQUENT WRITTEN AGREEMENT BETWEEN THE PARTIES ALTERING SUCH WORDING.**

The letters referred to are Exhibit 11 for Id. (Tr. 74) and Exhibit 14 for Id. (Tr. 84.) The effect of these letters is that both parties agreed in writing that the order or contract (Exhibit 1) was a firm order not only as to price but as to quantity for the period involved. This amounts to a subsequent agreement between the parties, which evidence is admissible under the parol evidence rule.

*Civil Code*, §1698;

*Cal. Jur.* 10-Yr. Supp., p. 160;

*Texas Co. v. Todd*, 19 Cal. App. (2d) 174, 184-185.

The cited case involved a contract for the purchase of gasoline. Subsequent to the execution of the contract there was a discussion regarding a third type of gasoline, and prices at which it was to be sold and discounts given. There were letters and telegrams exchanged between the parties regarding the problem presented, and the court stated as follows:

"Assuming without so deciding that the contract did include the definite fixing of a discount

of 2½ cents per gallon on third structure gasoline which was subsequently produced, we are of the opinion the telegrams and letters, which were transmitted between the parties, clearly indicate that they recognized the fact that a controversy existed between them regarding the discount to be allowed, and that they compromised that dispute and modified the contract or enlarged its terms so as to cover the omission and settle the difference by allowing a discount of 1½ cents per gallon on the third grade gasoline. The telegrams of July 8th and 9th, 1932, settled the dispute regarding that feature of the contract. That compromise agreement merged in the contract and became a part of it. There is no doubt the law authorizes such a modification or addition to a written executory contract by a written stipulation evidenced by the subsequent telegrams or letters." (Citing cases.) 19 Cal. App. (2d) at 185.

It seems clear, therefore, that even assuming the original contract was full and complete on its face, the parties modified such contract by their subsequent letters and understandings, which letters and understandings take the case out of the parol evidence rule.

---

**C. BY THEIR ACTS AND CONDUCT THE PARTIES RECOGNIZED THE ORDER OR CONTRACT AS A FIRM ORDER FOR THE QUANTITY OF LUMBER ORDERED, AND SUCH ACTS AND CONDUCT, INCLUDING LETTERS, ARE ADMISSIBLE TO EXPLAIN THE CONTRACT.**

It is clearly the law of this state that parties may place such construction upon their contract as they wish, *even though the construction placed upon it is*



*contrary to the written matter contained in the contract itself.*

The evidence shows in this case that a dispute arose between the parties, principally upon the matter of price, (Pl. Exh. 11 for Id., Tr. 74), that shipments under this order had been made shortly after March 3, the date of the order, to and including September 18. Prior to September 18, to wit, July 25, 1950, the date of Exhibit 11 for Id., and the reply of the defendant to that letter, the letter of Mr. Bennett, an official of the defendant company, dated July 27 (Ex. 14 for Id.), the parties discussed this dispute and showed their understanding as they construed the contract, namely, that it was firm for the period involved. This evidence, we contend, is clearly admissible and is not violative of the parol evidence rule.

Parties may construe their own contracts, and both are bound by such construction.

*Cal. Jur.*, 10-Year Supp., p. 133.

“\* \* \* It is to be assumed that parties to a contract know best what was meant by its terms and are the least likely to be mistaken as to its intention; that each party is alert to protect his own interests and to insist on his rights; and that whatever is done by the parties during the period of the performance of the contract is done under its terms as they understood and intended it should be. Parties are far less likely to have been mistaken as to the meaning of their contract during the period when they are in harmony and practical interpretation reflects that meaning than when subsequent differences have impelled



them to resort to law and one of them then seeks an interpretation at variance with their practical interpretation of its provisions.”

12 *Am. Jur.* p. 789.

“\* \* \* ‘Parties to a contract have a right to place such an interpretation upon its terms as they may see fit, *even when such an interpretation is apparently contrary to the ordinary meaning of its provisions.* It is to be assumed that they best know what was meant by its terms, and are the least liable to be mistaken as to its intention; that each party is alert to his own interests, and to insistence on his rights, and that whatever is done by them contemporaneously with the execution of the contract is done under its terms as they understood and intended it should be.’

“The principle that parties should be bound by the construction placed upon a contract by a long course of conduct is eminently just and fair, and, we think, amply supported by the authorities.” (Emphasis added.)

*Loomis F. G. Assn. v. California F. Exch.*, 128 Cal. App. 265, 275.

“\* \* \* Parties to a contract have a right to place such an interpretation upon its terms as they see fit, *even when such an interpretation is apparently contrary to the ordinary meaning of its provisions.* And in all cases where the terms of their contract, or the language they employ, raises a question of doubtful construction, and it appears that the parties themselves have practically interpreted their contract, the courts will follow that practical construction. It is to be assumed

that parties to a contract best know what was meant by its terms, and are the least liable to be mistaken as to its intention; that each party is alert to his own interests, and to insistence on his rights, and that whatever is done by the parties contemporaneously with the execution of the contract is done under its terms as they understood and intended it should be. Parties are far less liable to have been mistaken as to the intention of their contract during the period while harmonious and practical construction reflects that intention, than they are when subsequent differences have impelled them to resort to law, and one of them seeks a construction at variance with the practical construction they have placed upon it. The law, however, recognizes the practical construction of a contract as the best evidence of what was intended by its provisions. In its execution, every executory contract requires more or less of a practical construction to be given it by the parties, and when this has been given, the law, in any subsequent litigation which involves the construction of the contract, adopts the practical construction of the parties as the true construction, and as the safest rule to be applied in the solution of the difficulty." (Emphasis added.)

*Mitau v. Roddan*, 149 Cal. 1, 14-15;

*Texas Co. v. Todd*, supra;

*Rosenberg v. Moore*, 194 Cal. 392, 403.

It follows, therefore, from the exchange of correspondence between the parties, that they treated the order as an order not only for the full amount of cut lumber set forth in the order, but at the definite

prices therein set forth. Not only were the acts of the parties consistent with an order for a definite time at definite prices, but the parties reduced that understanding to writing as evidenced by the above letters. Those letters are executed agreements between the parties, modifying the original order, and are consistent not only with the principle set forth in *Texas v. Todd*, supra, but also with the case of *Mitau v. Roddan*, supra, which seem to be the settled law of this state.

---

**D. THE PRINTED LANGUAGE REFERRED TO, IF OPERATIVE AT ALL, WAS FOR THE BENEFIT OF PLAINTIFF ONLY.**

As we have heretofore indicated, the first page of the order, as well as the second page of the order (Pl. Exh. 1; Tr. 24) contain the following language in very fine print:

“It is understood and agreed that any unshipped portion of this contract may be cancelled at any time, without cost to us.”

We think that quite obviously that language was placed there for the benefit of the plaintiff and was a proper reservation for the plaintiff in the conduct of its business. Otherwise the typewritten insert “The prices on this order are firm” would be entirely meaningless from a practical standpoint.

The word “us” on the printed form, if we are to apply ordinary standards of construction, could only refer to plaintiff, for the order was sent by plaintiff to the defendant company with that printed reservation on it.

As the order shows, it was accepted (lower left hand corner of Exhibit 1) by the President of the defendant company, Mr. Rygel.

Actually Exhibit 1 was an order sent to the defendants for acceptance by them, with the printed reservation being a part of the order. Exhibit 1, therefore, was an offer made by plaintiff to defendant and accepted by the latter. The reservation regarding cancellation could only therefore have been intended for the benefit of the plaintiff, if reasonable standards are applied to it.

If, therefore, and we think the order clearly shows, the cancellation reservation was only for the benefit of the plaintiff and was so accepted by the defendant, the provision did not inure to the benefit of defendant, and that particular provision of the order cannot be used by defendant as a defense to an action for breach of their obligation to ship under the terms and conditions of the order.

The cancellation provision of the contract, therefore, being for the benefit of the plaintiff, it could, of course, be waived by plaintiff, and the letters heretofore referred to, namely Exhibits 11 and 14, show very clearly that that printed portion of the contract regarding cancellation was never intended to be a portion of the contract. For the letter of July 25 by plaintiff to defendant (Tr. 74) states: "Our order with you and Dunsmuir Lumber Company was a firm order," and in reply to that letter the defendant company, through Mr. Bennett, one of its directors (Exh.



14 for Id.; Tr. 84) stated: "With reference to this being a firm order my discussion with the mill and subsequent representations to you were to that effect."

Therefore, not only was the printed provision regarding cancellation for the benefit of the plaintiff, it was in effect waived by the plaintiff and the defendant through the above correspondence mentioned, which stated that both parties agreed and understood that it was a firm order as to quantity.

We respectfully submit, therefore, that the trial court improperly and erroneously excluded the evidence in plaintiff's offer of proof, which evidence has hereinabove been set forth and which evidence would show (a) that the cancellation privilege was not intended for the benefit of the defendant; (b) that the cancellation provision in the order was cancelled; and (c) that the parties agreed through subsequent writings and agreements that the order was a firm order for the quantity of lumber ordered.

Dated, San Francisco, California,

November 19, 1951.

GLADSTEIN, ANDERSEN & LEONARD,

By GEORGE R. ANDERSEN,

*Attorneys for Appellant.*



PAUL P. O'BRIEN  
CLERK

DEC 19 1951

FILED

No. 13,074

IN THE

United States Court of Appeals  
For the Ninth Circuit

THE COMMANDER DOOR, INC. (a corporation),

*Appellant,*

vs.

DUNSMUIR LUMBER Co. (a corporation),

*Appellee.*

APPELLEE'S REPLY BRIEF.

FILED CARLTON AND SHADWELL,  
Carter Building, Redding, California,  
*Attorneys for Appellee.*

DEC 19 1951

PAUL P. O'BRIEN  
CLERK



## Subject Index

---

	Page
Statement of the case .....	1
Argument .....	5
I. The March 3 contract was clear and unambiguous and parol evidence pertaining thereto was thus inadmissible	5
II. The provision respecting cancellation was reciprocal as to the parties; in any event the law imposes reciprocity in order to give mutuality to the contract.....	9
III. There were no letters or conduct modifying the con- tract of March 3 .....	11
Conclusion .....	12

## Table of Authorities Cited

Cases	Pages
Barnhart Aircraft, Inc. v. Preston, 212 Cal. 19, 297 Pac. 20	16
Briggs v. Marcus-Lesoine, Inc., 3 C.A. (2d) 207, 39 P. (2d) 442	19
Browne v. Fletcher Aviation Corp., 67 C.A. (2d) 855, 155 P. (2d) 896	8
California Refining Co. v. Producers Refining Corporation, 25 C.A. (2d) 104, 76 P. (2d) 553	10
Chas. Brown & Sons v. White Lunch Co., 92 Cal. App. 457, 268 Pac. 490	11
Coneland Water Co. v. Nickolls, 75 Cal. App. 212, 242 Pac. 518	17
County of Alameda v. Ross, 32 C.A. (2d) 135, 89 P. (2d) 460	10
Fabbro v. Dardi & Co., 93 C.A. (2d) 247, 209 P. (2d) 91	9
Hughes v. Pacific Wharf & Storage Co., 188 Cal. 210, 205 Pac. 105	17
Masciotra v. Harlow (1951), 105 A.C.A. 454	7
Naify v. Pacific Indemnity Co., 11 C. (2d) 5, 76 P. (2d) 663	10
Parker v. Meneley (1951), 106 A.C.A. 438	7
Purdy v. Buffum, Inc., 95 Cal. App. 299, 272 Pac. 770	17, 18
Shortell v. Evans-Ferguson Corp., 98 Cal. App. 650, 277 Pac. 519	11

## Codes

### Civil Code:

Section 1625	6
Section 1638	6
Section 1698	12

# TABLE OF AUTHORITIES CITED

iii

<b>Texts</b>		<b>Page</b>
20 Am. Jur. 958 .....		6
4 Cal. Jur. Ten Year Supp. 96 .....		9
4 Cal. Jur. Ten Year Supp. 134 .....		14
6 Cal. Jur. 261-262 .....		7
6 Cal. Jur. 304 .....		14

## **Rules**

Rules of Civil Procedure, Rule 41b .....	1
--	---





IN THE  
**United States Court of Appeals**  
**For the Ninth Circuit**

---

THE COMMANDER DOOR, INC. (a corporation),

*Appellant,*

vs.

DUNSMUIR LUMBER Co. (a corporation),

*Appellee.*

---

**APPELLEE'S REPLY BRIEF.**

---

**STATEMENT OF THE CASE.**

This is an appeal from a judgment in favor of the appellee entered pursuant to a motion to dismiss. (Rule 41 b, Rules of Civ. Proc.) The motion was made at the conclusion of the appellant's evidence. The action is founded on a written contract and the facts are simple.

The appellant's complaint alleged that it had ordered certain lumber from the appellee and that by reason of failure in delivery the appellant suffered damages in the sum of \$21,400. (C.T. pp. 3-5.)

At the trial the appellant relied on a written agreement dated March 3, 1950. (R.T. pp. 24-25.) This was the same document referred to in the complaint.

The order in essence provided as follows: that the appellant ordered a certain quality of lumber from the appellee to be shipped pursuant to a shipping schedule and at fixed prices. The order was dated March 3 and the shipping schedule was periodic extending to November 15th. (R.T. pp. 24-25.)

The order was prepared by the appellant and accepted by the appellee. The order contains two pages and on each page the right of cancellation and termination at any time was reserved. The language of the instrument is as follows:

“It is understood and agreed that any unshipped portion of this contract may be cancelled at any time without cost to us.” (R.T. pp. 24-25.)

The signature of both parties is affixed to each page of the order and below the cancellation clause.

During the course of the lumber season problems arose respecting the contract. The parties had difficulty over payments and other matters and the appellee's source of supply ran short. The appellee sought to have the appellant obtain lumber temporarily from other sources. Such negotiations failed.

The appellee then exercised its right to terminate the contract as to the unshipped portions. Testimony to such effect was given by Mr. Howell, president of the appellant. (R.T. pp. 59, 60.)

At the trial (as in its pleadings) the appellant repeatedly declared that its action was on the contract of March 3. At the opening of the trial, Mr. Andersen, attorney for the appellant, stated (R.T. pp. 22-23):

“Mr. Andersen. *The issues are very simple. Our cause of action is based upon a contract dated March 3rd, a copy of which I am sure counsel for the defendant has (exhibiting to counsel).*”

And later Mr. Andersen stated (R. T. p. 27) :

“The Court. What is the contention here, that this (2) contract is *partially in writing and partially verbal*?

“Mr. Andersen. *No*; as I understand the issue from the plaintiff’s standpoint, it is simply this, your Honor: my client, the Commander Door Company back east ordered certain cut lumber from the defendant *under an order which is now Plaintiff’s Exhibit Number 1*. The order was accepted by the defendants.

The Court. *Your position is that the contract is complete in and of itself?*

Mr. Andersen. *Complete in and of itself.*”

The appellant’s evidence was all directed to the March 3 contract. After the motion to dismiss was made the appellant requested leave to reopen its case. (R.T. p. 62.) It then offered certain letters written *prior* to the date of the order. Three letters dated subsequent to March 3 were also offered. Objection to the evidence was made on the ground that the proposed evidence violated the parol evidence rule and in any event was immaterial. (R.T. p. 86.) Such objection was sustained. (R.T. p. 86.)

For clarity we will summarize the contents of the offered letters. The first one is dated September 30,

1949 (prior to the contract) and is simply advice by a lumber broker connected with the appellee (Fred Bennett) that the appellee manufactures certain lumber of a type used by the appellant. (R.T. pp. 66-67.)

The next letter offered was dated February 10, 1950 (*prior* to the order) from Bennett to the appellant. This simply emphasizes that the appellee must have the appellant's order if the parties are to do business. (R.T. p. 69.)

The next letter was dated February 23, 1950 (prior to the contract) from Bennett to the appellant. This letter simply discusses the price of the lumber that is to be bought. (R.T. p. 73.)

The next letter is dated July 25, 1950 (*post* contract) and is from the appellant to Bennett. In this the appellant states:

“\* \* \* our order with you and the Dunsmuir Lumber Company was a firm order and was not placed with you with the understanding that the prices were to be made at the time of shipment”. (R.T. p. 74.)

The appellant also offered an order of February 17, 1950 (prior to contract) which was not executed by the appellee.

The next letter offered was dated February 20, 1950 (prior to contract) and refers to the rejected order of February 17. It contains a general discussion of the prices at which appellee will sell lumber and states that the appellee will not submit to fluctuating prices but that any price schedule must be “firm”. (R.T. pp. 79, 81-83.)



The appellant also offered a letter dated July 27, 1950 (post contract) which refers generally to prices and that they were to be "firm" in the order.

The offered evidence added nothing to the contract and was clearly objectionable. The contract itself provided that the prices were to be firm". It states (R.T. p. 25):

"The prices on this order are firm."

Thus the letters do not add or detract from the contract. The prices were not subject to adjustment by either party; but either party could cancel the contract at any time as to any unshipped portion thereof.

The trial Court held that the contract was clear on its face; was not ambiguous; that the provisions as to firm prices and right of cancellation were clearly reconcilable; that thus parol evidence was not admissible. (R.T. pp. 86-87.)

---

## ARGUMENT.

### I.

**THE MARCH 3 CONTRACT WAS CLEAR AND UNAMBIGUOUS  
AND PAROL EVIDENCE PERTAINING THERETO WAS THUS  
INADMISSIBLE.**

As stated, the March 3 contract provided that as to price it was firm but that it was subject to cancellation as to unshipped portions.

The contract was not ambiguous and the two provisions are not in conflict. As long as the contract remained in effect the prices were to be firm. This

was important because it prevented price changes while shipments were in transit. But the appellant in its order desired to have an escape provision. So it provided that the contract could be cancelled without liability at any time as to any unshipped portions of the contract.

The cancellation clause is not ambiguous. It is not repugnant to the price clause. The clauses are consistent and thus evidence of negotiations or other parol evidence is inadmissible. The law is clear in this respect.

Section 1625 of the California Civil Code provides:

“The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.”

And Section 1638 of the Civil Code provides:

“The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.”

The prevailing and uniform rule is stated in 20 *Am. Jur.* p. 958 as follows:

“It is a general principle that where the parties to a contract have deliberately put their engagement in writing in such terms as import a legal obligation without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the entire engagement of the parties and the extent and manner of their undertaking have been reduced to writing; in

other words, the parol agreement is merged in the written agreement and all parol testimony of prior or contemporaneous conversations or declarations tending to substitute a new and different contract for the one evidenced by the writing is incompetent."

The above rule was recently applied by the California Court in the case of *Masciotra v. Harlow* (July 1951) 105 A.C.A. 454, where the Court held at page 460:

"Much of the evidence introduced was of negotiations which took place prior to the execution of the lease. Since the agreement of the parties has been reduced to writing the written document supersedes all the oral negotiations and there can be no evidence of the terms of the agreement other than the contents of the writing."

See also,

*Parker v. Meneley* (August 1951) 106 A.C.A. 438.

(The Pacific Reporter citations of the above cases are not presently available.)

The California rule respecting parol evidence is aptly summarized in 6 *Cal. Jur.* 261-262, as follows:

"As a general rule, preliminary negotiations leading up to a contract, and not embodied in it, constitute no part of the final binding contract, and its legal effect cannot be changed by reference to them. When the terms of an agreement have been reduced to writing, no evidence of other negotiations or terms is admissible. It must be presumed, in the absence of fraud, acci-

dent or mistake, that the entire negotiations of the parties are included in the contract as executed. The written contract must control as to all the terms expressed in it; and if there is any difference between it and the oral agreement, the document must be referred to in order to determine the rights of the parties."

In *Browne v. Fletcher Aviation Corp.*, 67 C.A. (2d) 855, 155 P. (2d) 896, the Court held on this issue (p. 860):

"Whatever the preliminary proposals may have been, they were of course merged in the written agreement and could not be given effect to add to, alter or modify its plain terms."

The cases are legion on this issue but the law is so fundamental extended citation is useless. It is quite clear that all evidence offered by the appellant of the preliminary negotiations of these parties is objectionable. The trial Court therefore properly rejected it.

The plain contract between the parties is that it is subject to cancellation at any time as to any unshipped lumber. The appellee simply exercised its contractual right and terminated the contract.

## II.

THE PROVISION RESPECTING CANCELLATION WAS RECIPROCAL AS TO THE PARTIES; IN ANY EVENT THE LAW IMPOSES RECIPROCITY IN ORDER TO GIVE MUTUALITY TO THE CONTRACT.

The provision in issue has been quoted above. It provides that the contract can be cancelled at any time as to any unshipped lumber without cost to us. The appellant has made the contention that such clause is for its benefit only. Such position is contrary to the express language since it refers to both parties; and it is over the signature of both parties. Thus the word "us" must refer to both signing parties.

In addition, unless the provision is mutual and reciprocal the purported contract is null and void because of the absence of mutuality. The California law is quite clear on this issue.

The rule is thus stated in 4 *Cal. Jur.* Ten Year Supp. 96, as follows:

"A contract which reserves in either party an option to deliver or to accept personal property, or which contracts for future delivery thereof, the quantity of which delivery is dependent upon the will, wish, want or desire of the other party, is void for lack of consideration and mutuality."

A leading case is that of *Fabbro v. Dardi & Co.*, 93 C.A. (2d) 247, 209 P. (2d) 91, where the Court held (p. 251):

"In the case of an instalment contract, like this one, the contract is subject to cancellation by one



party at any time is binding only to the extent to which it has been performed and is revocable by either party as to the portion not yet performed. 'The law is well settled that, where a contract for the future delivery of personal property confers upon either party an arbitrary right of cancellation prior to delivery, it is lacking in mutuality and will be held binding upon the parties only to the extent that it has been performed.' "

The Supreme Court of California applied this principle in *Naify v. Pacific Indemnity Co.*, 11 C. (2d) 5, 76 P. (2d) 663, where it stated (p. 11):

"Parties are, within reason, free to contract as they please, and to make bargains which place one party at a disadvantage; but a contract must have mutuality of obligation, and an agreement which permits one party to withdraw at his pleasure is void."

And in *California Refining Co. v. Producers Refining Corporation*, 25 C. A. (2d) 104, 76 P. (2d) 553, the Court held (pp. 107-108):

"It is uniformly held that a contract which reserves in either party an option to deliver or to accept personal property, or which contracts for future delivery of personal property, the quantity of which delivery is dependent upon the will, wish, want or desire of the other party, is void for lack of consideration and mutuality."

See to the same effect:

*County of Alameda v. Ross*, 32 C.A. (2d) 135, 89 P. (2d) 460;

*Shortell v. Evans-Ferguson Corp.*, 98 Cal. App. 650, 277 Pac. 519;

*Chas. Brown & Sons v. White Lunch Co.*, 92 Cal. App. 457, 268 Pac. 490.

It is patent therefore that the provision must be construed to be for the benefit of both parties to the contract. If it be for the benefit of the appellant alone the contract is null and void and not binding on anyone except to the extent that it has been performed. Thus the appellee under either theory had an absolute right to cancel the contract as to the unfilled portion thereof.

---

### III.

#### THERE WERE NO LETTERS OR CONDUCT MODIFYING THE CONTRACT OF MARCH 3.

Appellant somewhat vaguely asserts that the acts and conduct of the parties modified the agreement of March 3. Such contention is rather ill-taken when we consider the appellant's statement at the outset of the trial (R.T. p. 27):

“The Court. What is the contention here, that this (2) contract is *partially in writing and partially verbal*?

Mr. Andersen. *No*; as I understand the issue from the plaintiff's standpoint, it is simply this, your Honor: my client, the Commander Door Company back east ordered certain cut lumber from the defendant *under an order which is now Plaintiff's Exhibit Number 1*. The order was accepted by the defendants.

The Court. *Your position is that the contract is complete in and of itself?*

Mr. Andersen. *Complete in and of itself."*

And there was no conduct or acts that modified the contract. Acts could not modify a written agreement because an agreement can only be modified by a writing or an executed parol agreement. (Cal. Civil Code, Sec. 1698.)

And there was no written modification. As stated on page 13 of the appellant's brief the parties were in conflict at times over prices. And the correspondence that the appellant points to concerns such argument over price only. It does not purport to modify the provision of the contract respecting cancellation.

The two items of correspondence relied on by the appellant are Exhibits 11 and 14 for identification.

Exhibit 11, dated July 25, 1950, was written by the appellant to Bennett and clearly refers to price clause and not to the cancellation provision of the agreement. It states (R.T. p. 74):

"This will acknowledge receipt of your letter of the 21st and to advise that our order with you and Dunsmuir Lumber Company was a firm order and was not placed with you with the *understanding that the prices were to be made at time of shipment.*"

The entire letter, consisting of the above and three more paragraphs, relates to price only. There is no intent to modify the agreement whatever.

And the reply of Bennett is quite clear that the contract was not being modified. Bennett stated (R.T. 84):

“With reference to this being a firm order. My discussions with the mill and subsequent representations to your were to that effect. *However, your initial order of February 17th stated: ‘The price quoted is firm. However, when general market conditions are lower, prices are to be adjusted.’ This order was not acceptable and was returned. I do not have a copy of the present order in my office.* As stated in our telephone conversation, normal increases were to have been absorbed and the mill has done so.”

Quite clearly this letter has reference to prices. And Bennett stated that it referred to the original order (of Feb. 17) and that he did not know what was in the final order and did not have a copy of it. (Bennett was a lumber broker with offices in Portland, Oregon; the appellee’s offices were in Dunsmuir, California.)

Obviously, there was no intent at any time to modify the March 3 contract. As the appellant stated, it was “complete in and of itself”.

At no time did anyone offer to change or alter the original contract. The parties were in dispute because of certain price increases and the appellant insisted that the agreement was firm as to prices. The contract so provided and the appellant would not yield to arguments that an adjustment should be made. Under such circumstances the appellee elected to cancel the *entire* contract and did so.



The appellant sought to have the contract interpreted to bind the appellee firmly as to prices and then have the reservation of cancellation for its benefit only.

The law however does not permit this. The cancellation provision is either for the appellee's benefit or the entire agreement is void.

There is no question but that conduct can be used to interpret a contract where the meaning is doubtful. But here there is no conduct indicating an intent on the part of either party to write out the cancellation clause. Their agreements over price had nothing to do with the clause; when adjustments could not be obtained the appellee simply cancelled.

The only time that conduct is important is when the meaning of the words is doubtful. The words here are clear and do not require extrinsic evidence. The rule is clearly to this effect and has been succinctly declared in 6 *Cal. Jur.* 304:

“The intention of the parties is to be ascertained from the writing alone, if possible, and not from the subsequent actions of one of them. However, it is well recognized that the terms of a contract may be manifested by conduct, when not stated in words. And *where the meaning is doubtful*, the acts of the parties done under a contract afford one of the most reliable means of arriving at their intention.”

And in 4 *Cal. Jur. Ten Year Supp.* 134, it is stated:

“It is only *under some circumstances* that the practical construction placed on a contract by the



parties furnishes controlling evidence of what they intended by its terms. In construing acts or expressions as constituting interpretation by the parties of a written contract at variance with the ordinary import of its terms, *it is a cardinal rule that it ought to appear with reasonable certainty that they were acts of both parties, done with knowledge, and in view of a purpose at least consistent with that to which they are later sought to be applied. Such acts must be direct, positive and deliberate and must show that the acts so done were done in an attempted compliance with the terms of the contract or agreement."*

The appellee demonstrated its understanding of the contract when it cancelled it.

Here the argument was over price. At no time did the appellant contend that the appellee could not cancel the contract. There are no words in either of the letters referred to by the appellant which even intimate this. And certainly Bennett could not write a provision out of the contract which was not referred to specifically and when he did not even have a copy of the contract. There is no evidence that Bennett ever saw the agreement of March 3. The agreements were signed by Mr. Rygel, the president of appellee.

The general citations mentioned in the appellant's brief refer to contracts containing ambiguities and thus are not in point here. Further, they are cases where the conduct helped in construing doubtful clauses. Here the cancellation clause is not doubtful; and there is no conduct directed to its interpretation.

A case directly in point is *Barnhart Aircraft, Inc. v. Preston*, 212 Cal. 19, 297 Pac. 20. Here the plaintiff contracted to build a brick plant of a certain capacity for the defendant and the defendant agreed to pay therefor when the plaintiff demonstrated the plant had the required capacity. The plant was built but the plaintiff failed to demonstrate its capacity. Defendant refused payment and plaintiff brought suit. The plaintiff claimed that the production failure was caused by the defendant's failure to provide a satisfactory concrete mixer and the plaintiff contended this was the defendant's obligation. The contract provided that the plaintiff would furnish all machinery except a concrete mixer. The plaintiff pleaded as follows (p. 21):

“Respondent sets forth in its complaint that it was understood and agreed between the parties that appellants were to furnish, provide and install in connection with said brick-making machine a concrete mixer in all respects adequate to provide and capable of providing sufficient concrete in the proper form and mixture to permit said machine to operate in the making of brick continuously and to produce 25,000 brick in ten or less successive hours.”

The trial Court permitted parol evidence of contemporaneous and subsequent conduct of the parties to prove the plaintiff's contention. The California Supreme Court held this reversible error because the contract was unambiguous and did not require interpretation. The Court stated (pp. 23-24):

“ “ “It must be borne in mind that although declarations of the parties may in some cases be received to explain contracts or words of doubtful meaning, yet no other words can be added to or substituted for those of the writing. The courts are not at liberty to speculate as to the general intention of the parties, but are charged with the duty of ascertaining the meaning of the written language.”

‘The effect of the evidence received by the court in the instant case was to write into the contract a provision not placed there by the parties, although respondent in its complaint attempted by pleading the legal effect of the contract to incorporate therein such an understanding, but when confronted with the document itself the interpolation becomes obvious. \* \* \*’

It is settled law that when the language of a contract is clear and unambiguous the conduct of the parties is immaterial since they cannot change the terms of their agreement except in a manner authorized by law. A written agreement can only be altered by another written agreement or by an executed parol agreement.

*Hughes v. Pacific Wharf & Storage Co.*, 188 Cal. 210, 205 Pac. 105;

*Coneland Water Co. v. Nickolls*, 75 Cal. App. 212, 242 Pac. 518;

*Purdy v. Buffum, Inc.*, 95 Cal. App. 299, 272 Pac. 770.

In the *Hughes* case, *supra*, the California Supreme Court held (p. 217):

“In the first place, if the contract is definite and certain it is neither *necessary nor proper* to rely upon the conduct of the parties for its construction. Rules of construction are resorted to for the purpose of ascertaining what the contract really was and if that matter is not in doubt, it is unnecessary to rely upon those considerations which obtain where the construction of the contract is in doubt.”

In the *Purdy* case *supra* the plaintiff had a contract for wages at \$50.00 per week and a commission. Subsequently she signed a memorandum stating her wages were \$50.00 per week and no reference was made to the commission. The Court held that as a matter of law the original contract was not modified. (In the instant case the letters referred to the prices being “firm”; so did the contract. This could not annul the cancellation clause.)

In the *Purdy* case the Court held subsequent conduct inadmissible to construe an unambiguous contract. It stated (p. 303):

“Appellant next contends for the rules that a contract may be explained by reference to the circumstances under which it was made and *that the acts of the parties done under a contract afford one of the most reliable means of arriving at their intention. But these rules are not applicable in construing clear and unambiguous contracts.* They have to do with the contracts in which the intention of the parties cannot be ascertained from the writing alone because the writing is doubtful, uncertain, or ambiguous.



The intention of the parties is to be ascertained from the writing alone if possible. Surrounding circumstances and subsequent conduct may be invoked to interpret a contract only in cases where upon the face of the contract itself there is doubt, and the evidence is used to dispel that doubt, not by showing that the parties meant something other than what they said, but by showing what they meant by what they said.”

In *Briggs v. Marcus-Lesoiné, Inc.*, 3 C.A. (2d) 207, 39 P. (2d) 442, the parties were in dispute over the expenditure clause of a contract. The appellant produced a letter *subsequent* to the contract to show the interpretation of the parties. The Court held the letter inadmissible and said (p. 212):

“Since the language of the letter of April 26th clearly expresses the intent to limit the expenditures authorized to one-third of the cost of advertising done in the ‘Tower Magazines’, *the letter of November 2nd can avail appellant nothing as evidence of the interpretation placed upon the agreement by the parties. The circumstances surrounding the execution of a contract in writing, and the subsequent conduct of the parties thereto, may be invoked to interpret it only in those cases where upon the face of the writing itself there is doubt.*”

It is thus apparent that the letters subsequent to March 3 avail the appellant nothing. The agreement is clear on its face and thus subsequent conduct is immaterial.



**CONCLUSION.**

It is clear that the judgment should be affirmed. The March 3 agreement is clear and gives an unequivocal right of cancellation. Such clause is for the benefit of both parties.

The appellee elected to cancel and this foreclosed any right of action for undelivered lumber.

The appellant's offer of proof is immaterial because none of it purported to or in any way suggests that it was intended to alter the March 3 contract. The proof all related to a price discussion and not to the cancellation clause or the duration of the agreement.

And the proof was inadmissible because the contract was clear and certain. The previous discussion establishes that when the contract is unambiguous that neither prior negotiations or subsequent conduct of the parties is admissible. The contract cannot be varied or altered by parol conduct. The trial Court properly rejected the appellant's offer of proof since it was both immaterial and in violation of the parol evidence rule.

Dated, Redding, California,  
December 17, 1951.

Respectfully submitted,

CARLTON AND SHADWELL,

By DANIEL S. CARLTON,

*Attorneys for Appellee.*

No. 13,075

United States Court of Appeals  
For the Ninth Circuit

---

FRED BENIOFF, Bankrupt,	}	<i>Appellant,</i>
vs.		
BURTON J. WYMAN, Referee in Bankruptcy, and JOHN O. ENGLAND, Trustee in Bankruptcy,	}	<i>Appellees.</i>

BRIEF OF APPELLEE,  
JOHN O. ENGLAND, TRUSTEE IN BANKRUPTCY.

---

DINKELSPIEL & DINKELSPIEL,  
333 Montgomery Street, San Francisco 4, California,  
JACOBS, BLANCKENBURG & MAY,  
625 Market Street, San Francisco 5, California,  
JAMES M. CONNERS,  
444 Market Street, San Francisco 11, California,  
*Attorneys for Appellee,*  
*John O. England, Trustee in Bankruptcy.*

FILED



## Table of Authorities Cited

<b>Cases</b>	<b>Pages</b>
Allen v. DuPont, 75 Fed. Supp. 546 .....	2
Benedict v. Seiberling (D. C.), 17 F. (2d) 831 .....	6
Berger v. U. S., 255 U.S. 22, 41 S. Ct. 230, 65 L. Ed. 481 .....	6
Craven v. United States, 22 Fed. (2d) 605 .....	15
DeRan v. Killits, 8 Fed. (2d) 840 .....	6
Ex parte American Steel Barrel Co., 230 U.S. 35, 33 S. Ct. 1007, 57 L. Ed. 1379 .....	5, 6
Fish v. East, 44 ABR(NS) 252 .....	4
In re McFerren, 5 Fed. Supp. 181 .....	6
J. P. Linahan, Inc., 138 Fed. (2d) 650 .....	15
Laughlin v. U. S., 151 F. (2d) 281 .....	6
Refior v. Lansing Drop Forge Co., 124 F. (2d) 440, certiorari denied, 316 U.S. 371 .....	6
Sanders v. Allen, 58 Fed. Supp. 417 .....	7
Scott v. Beams, 122 F. (2d) 177 .....	2
Skirvin v. Mesta, 141 F. (2d) 668 .....	2
U. S. v. Costea, 52 Fed. Supp. 3 .....	2, 3
U. S. v. Foster, 81 Fed. Supp. 280 .....	7
Whitaker v. McLean, C.A. D.C., 118 F. (2d) 596 .....	14

### Statutes

11 U.S.C. Section 337, Chapter 11 .....	11
11 U.S.C.A. Section 45, subsection (b) (Section 22 of the Bankruptcy Act) .....	1, 4
11 U.S.C.A. Section 52 .....	14
11 U.S.C.A. Sections 725-726 .....	14
28 U.S.C.A. Section 144 .....	2, 4

### Texts

2 Remington on Bankruptcy, page 71 .....	2
--	---





# United States Court of Appeals

## For the Ninth Circuit

---

FRED BENIOFF, Bankrupt,  
*Appellant.*

vs.

BURTON J. WYMAN, Referee in Bankruptcy, and JOHN O. ENGLAND, Trustee in Bankruptcy,  
*Appellees.*

### BRIEF OF APPELLEE.

JOHN O. ENGLAND, TRUSTEE IN BANKRUPTCY.

---

### ARGUMENT.

The bankrupt's motions to transfer the hearing on the trustee's objections to the bankrupt's discharge (R. 1-11) and all other proceedings (R. 33-43) from Referee Burton J. Wyman were made pursuant to the provisions of Section 22 of the Bankruptcy Act, Title 11, U.S.C.A. Section 45, Subsection (b), which reads: "The judge may at any time for the convenience of parties or for cause transfer a case from one Referee to another."

It may be noted in appellant's brief, his opening statement incorrectly states the substance of the fore-

going statute in that he states "a Referee may be removed for cause." (Appellant's Brief p. 6, line 3.)

The bankrupt's petition sets out specifications of alleged evidence of personal bias and prejudice on the part of the Referee. (R. 2-10.) A discussion of the specifications with reference to the transcript will be made hereinafter.

*Remington on Bankruptcy*, Vol. 2, page 71, states:

"Facts should be stated which tend to show personal bias or prejudice with the same fullness as would be required under the Federal statute providing for the disqualification of judges."

The federal statute referred to is 28 U.S.C.A., 144. The cases hold that the provisions of Section 144 must be strictly complied with by the moving party. *Skirvin v. Mesta*, 141 F. (2d) 668; *Scott v. Beams*, 122 F. (2d) 177; *Allen v. DuPont*, 75 Fed. Supp. 546. Also see *U. S. v. Costea*, 52 Fed. Supp. 3, which holds:

"This section was not intended to enable one clearly guilty of the offense charged to secure imposition of sentence by another judge whom he believes might impose a lighter sentence, and judge has no right to evade his official duty by voluntarily withdrawing on accused's request."

It is apparent from the record in the case at bar that the request to transfer made by the bankrupt is frivolous and not made in good faith since the bankrupt has made no previous move to have his general examination or other proceedings under the

Section 21-A examination transferred, whereas one of the specifications (No. 1) (R. 2) charges an act of personal bias and prejudice to the Referee prior to the institution of the instant voluntary proceedings—the others follow shortly thereafter. It is obvious that the atmosphere the bankrupt has created by his actions, his testimony and his refusal to cooperate with the trustee in bankruptcy cause him to now want the matter of his discharge heard by a different Referee, believing that he will possibly get his discharge by having the matter heard *de novo*, so to speak. In other words, the situation in *U. S. v. Costea*, *supra*, fits the instant situation perfectly.

In this case the appellant bankrupt has not only permitted proceedings to be had in connection with the bankruptcy from May 1, 1950, to the date of the filing of his petitions to disqualify Referee Wyman, but during that period numerous adversary proceedings have been had other than a 21-A examination, namely, (1) the question determined adversely to the bankrupt and over his objections for the appointment of a receiver during the pendency of his Chapter XI proceeding, from which no review was taken; (2) the adjudication of the debtor, a bankrupt, over his objections from which order no review was taken; and (3) the adversary proceeding involving the bankrupt appellant's petition to amend his schedules in bankruptcy denied by the Referee from which no review was taken.

It is also of importance that in connection with appellant's view of the law in which appellees agree,

that in arriving at the interpretation and application of 11 U.S.C.A. 45(b), the application and interpretation of 28 U.S.C.A. 144 must be complied with. In this connection appellant did not file an affidavit of personal bias and prejudice accompanying his petitions to the district judge, nor was there any certificate of good faith filed by his counsel.

There are few cases involving the transfer of a cause from the Referee to whom it has been assigned to another Referee, and those cases seem quite limited in their application. The rule apparently being that instead of removal, unless a clear case of personal bias and prejudice is made out, the party allegedly aggrieved always has his right of review. See *Fish v. East*, 44 ABR(NS) 252, U.S.C.C.A., Tenth Circuit, June 29, 1940, in which case the Court said:

“The referee is not a judge within the meaning of Section 1(20) of the Bankruptcy Act, 11 U.S. C.A., P1(20), and of P21 of the Judicial Code, 28 U.S.C.A., P25. The referee is an officer of the Bankruptcy Court appointed and removable only by the judge of the United States District Court. P 1(22) and P 34(1), Bankruptcy Act, 11 U.S. C.A., PP 1(22), 62(1). The District Judge may also at any time for cause transfer a case from one referee to another. P 22, sub. (b), Bankruptcy Act, 11 U.S.C.A., P 45, sub. (b). There appears to be no rules either of said district, or in the rules of civil procedure, or in the general orders, relating to the removal or disqualification of referees. A party aggrieved by an order of the referee may file a petition for review. Sec-



tion 39, subs. (a)(10), (c), Bankruptcy Act, 11 U.S.C.A., P 67, subs. (a)(10), (c)."

In the case at bar the district judge has already reviewed the charges made by the appellant seeking the transfer of the cause for personal bias and prejudice from Referee Wyman to some other Referee (R. 61), and unless a serious abuse of discretion exists on the part of the district judge, his findings on the facts must be deemed conclusive. We submit that no abuse of discretion on the part of the district judge is apparent from the record.

Mr. Justice Lurton, in *Ex parte American Steel Barrel Co.*, 230 U.S. 35, 33 S. Ct. 1007, 1010, 57 L. Ed. 1379, said:

"The basis of the disqualification is that 'personal bias or prejudice' exists, by reason of which the judge is unable to impartially exercise his functions in the particular case. It is a provision obviously not applicable save in those rare instances in which the affiant is able to state facts which tend to show not merely adverse rulings already made, which made be right or wrong, but facts and reasons which tend to show personal bias or prejudice. It was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the pending cause."

And again at p. 182:

"(3) Nor does the court feel impelled to ask the referee to refuse to proceed further in this



matter, for it is commonly said that a judicial officer against whom an insufficient showing for recusation has been made owes it to his oath of office and to the litigant who invokes the jurisdiction of his court over which he presides not to withdraw from the case, however much his personal feeling may incline him so to do."

We desire to call the Court's attention to the fact that *Ex Parte American Steel Barrel*, supra, was cited with approval by the Supreme Court in *Berger v. U. S.*, 255 U.S. 22, 41 S. Ct. 230, 65 L. Ed. 481, cited by appellant. (Appellant's Brief pp. 6 and 20.)

See:

*Benedict v. Seiberling* (D.C.), 17 F. (2d) 831;  
*In re McFerren*, 5 Fed. Supp. at p. 181, District Court, E.D. Illinois, Aug. 29, 1933.

Also see:

*DeRan v. Killits*, 8 Fed. (2d) 840:

"A party who has been attorney for the bankrupt and consented to an adjudication in bankruptcy cannot have the judge disqualified where he acquiesced for years in disregard of his affidavit of disqualification instead of challenging the order striking the affidavit when made during which time the administration of bankrupt estate actively proceeded."

See also:

*Laughlin v. U. S.*, 151 F. (2d) 281;  
*Refior v. Lansing Drop Forge Co.*, 124 F. (2d) 440, certiorari denied, 316 U.S. 371.

What must an affidavit or a petition alleging personal bias and prejudice on the part of the judge or referee contain?

“An affidavit of personal bias or prejudice based only on the judge’s comments on questions of law affecting the sufficiency of the indictment and continuance based upon assumption that the allegations and the indictment were true did not meet requirements and will be stricken out of this section.”

*U. S. v. Foster*, 81 Fed. Supp. 280.

“Affidavits of personal bias or prejudice of trial judge filed under that section must be strictly construed so that such affidavit must state facts showing personal bias or prejudice of judge against the affiant.”

*Sanders v. Allen*, 58 Fed. Supp. 417.

The attempt by the bankrupt to disqualify the Referee from hearing the specifications in objection to his discharge filed by the trustee (R. 1-11) was filed approximately one year after the institution of proceedings by the bankrupt under Chapter XI of the Bankruptcy Act. There was an immediate reference of those proceedings to the present Referee. It is submitted that the affidavit of prejudice for the removal alleging personal bias and prejudice as filed herein was not made timely.

In the nine alleged specifications of evidence of personal bias and prejudice on the part of Referee Wyman set up as they appear in the petitions to transfer said cause to another Referee filed by the appel-

lant with the District Court (R. 2-10), we have the following observations to make.

In the first place, with the exception of two of these alleged specifications, all took place and were part of open Court proceedings. One took place (Specification No. 1) (R. 2) prior to the institution of the above proceedings in the United States District Court, and the other (Specification No. 5) (R. 5) likewise does not appear in the record. Directing ourselves for the moment strictly to those that appear in the record, we are unable to find any quoted testimony by appellant that would indicate personal bias and prejudice on the part of the Referee toward the bankrupt appellant. It is apparent by a reading of the transcript of the proceedings before the Referee in Bankruptcy, particularly on the day and dates to which reference has been made by appellant, that the Referee was highly tried at all stages of the proceedings by not only the bankrupt, but by the Mr. Weinblatt referred to in appellant's brief, and by all the other witnesses who testified on the general examination who had formerly been either employed by or associated with said bankrupt in business directly or through the Arnold Best Co.

In connection with the excerpt from the testimony referred to in appellant's Specification No. 2, of his petition (R. 3), taken from the Referee's transcript of May 29, 1950, lines 14 to 21 at page 62, we refer to that portion of the transcript commencing at line 18, page 57 to line 21, page 62, of the transcript

of the same date, from which it will be apparent that no prejudice or bias has been shown.

With reference to Specification No. 3 of appellant's petition for removal (R. 3), the statements charged to the Referee are in the first place comments on the evidence. Mr. Benioff on the day those statements were made, which by their very nature are not directed to him or about him, was not even in Court. See Referee's transcript of June 7, 1950, page 84. We likewise refer the Court to the testimony of that day offered by one William E. Blaskower, the then president of Arnold Best Co., commencing page 92 of the Referee's transcript of June 7, 1950, and particularly the language of Mr. William Klein, line 15, page 118, of the Referee's transcript of the same date.

Mr. William Klein, who at that time was counsel for the bankrupt, therein stated:

"Pardon me. May I respectfully state this: From the man's testimony it definitely appears he was never an officer of the Arnold Best Company, never had a nickel invested; he was made President by a couple of the directors. Chances are he was never even at a meeting, never at a directors' meeting since he came back from Europe; he has never been at a directors' meeting. He never had any actual connection with the company. All these facts are manifest from his testimony.

The Referee. It is quite manifest there is something radically wrong with the Arnold Best Company \* \* \*"



Then follows the remaining portion of the quotation by the appellant. (R. p. 3, last 5 lines.) We fail to see where there is anything showing in this statement of alleged personal bias or prejudice by the Referee against the bankrupt. It is the ordinary comment that any judge, having heard the testimony preceding, and in the light of counsel's statement, would have made.

In connection with Specification No. 1 of the bankrupt's petition for removal (R. 2), and the words attributed to Referee Wyman in the colloquy that allegedly occurred between the bankrupt and the Referee subsequent to the adjournment of Court, and taking into account the proceedings and charges of possible violation of the criminal provisions of the Bankruptcy Act had in Court on May 2, 1950, in the matter of Arnold Best Company, a corporation, an alleged bankrupt, No. 38692, pending in the United States District Court for the Northern District of California, Southern Division, which charges at that time were not controverted, and for that matter have never been controverted, the remark attributed to the Referee, if made, was only normal and was made as a result of the information and facts divulged at the preceding hearings. Likewise, it was only normal for the Referee before whom the matter was pending not to desire to discuss the case out of Court with any of the participants in the proceedings.

With reference to the 4th specification of the bankrupt's petition to transfer (R. 4), the excerpt is taken from page 153 of the Referee's transcript of testimony



of June 29, 1950, commencing line 3, and for a full understanding of the Referee's remarks we respectfully refer the Court to the Referee's transcript commencing line 17, page 149 of the transcript of June 29, 1950, through line 23, page 153.

The notes referred to were notes accepted by creditors under the 5-year plan proposed by debtor as his arrangement under Chapter XI, some of these creditors having been paid off by one Abe I. Weinblatt, a representative of the debtor, in varying amounts or given promises and guarantees, and it was for that reason that the remarks of the Referee were made as to a possible violation of the Bankruptcy Act by the debtor or his representatives.

The debtor, the appellant herein, clearly violated the provisions of United States Code Title XI, Chapter 11, Section 337, in that before the proposed arrangement had been accepted pursuant to the provisions of the Section, he had distributed the consideration to the creditors either directly or through Mr. Weinblatt, as the Referee's transcript of June 29, 1950 showed, and otherwise conducted himself in complete disregard of the provisions of the Bankruptcy Act, and to that end the remarks attributed to the Referee at that time were proper to ascertain to what extent and in what manner creditors had received their consideration before the approval and acceptance of any plan and before the deposit of the necessary funds in accordance with Section 337, *supra*, to pay priority creditors and expenses of administration. There is nothing in the remarks of the Referee quoted

by appellant from the transcript of the foregoing date that was in any way indicative of personal bias or prejudice by the Referee against the bankrupt.

If the colloquy attributed in Specification No. 5 of the bankrupt appellant's petition for removal (R. 5) took place there still is nothing in the alleged colloquy that shows personal bias or prejudice against the bankrupt. It merely involved an appraisal by the Referee, to which he is entitled, of the testimony of Mr. Abe I. Weinblatt.

With reference to Specification No. 6 of the petition (R. 5-8) we respectfully again submit the transcript preceding the portion lifted from the testimony of Mr. Weinblatt by the appellant, which commences line 21, page 182 to line 2, page 184, of the Referee's transcript of July 10, 1950, for a complete understanding of the Referee's remarks. These remarks were furthermore not directed to the bankrupt, or against the bankrupt, but were in connection with the examination of Abe I. Weinblatt. Again we refer to the portion of the Referee's transcript referred to in the petition (R. commencing line 23, page 6), which appears in the transcript of the same date, line 18, page 198 to line 2, page 200 of said transcript. For a clear understanding of the remarks quoted we respectfully refer the Court to the testimony of the Referee's transcript of that date, line 12, page 195 to line 2, page 200, which can show no personal bias or prejudice, but gives the background for the Referee's remarks.

Again the appellant, bankrupt, in his Specification No. 7 of his petition (R. 8), bodily lifts a portion of the Referee's transcript. In this connection we refer to the entire colloquy between counsel and the Referee in the Referee's transcript of July 19, 1950, commencing line 11, page 203 to line 70, page 211. The items of the Referee's transcript referred to have been taken from page 207 of the transcript of July 19, 1950, lines 6 to 11, and then the following portions of the transcript are skipped until we arrive at line 7, page 208 and it is quoted then to line 17, page 208. There is nothing in the transcript referred to by appellant in the remarks of the Referee that indicate any personal bias or prejudice on the part of the Referee against appellant.

In reference to Specification No. 8 of the petition (R. 8), the excerpt of the Referee's transcript quoted is taken from page 16, of the transcript of November 2, 1950, line 18, to line 16 of page 18. For a full understanding of the statements of the Referee in that connection, may we refer the Court to the transcript specifically of that date and to the entire preceding transcript of the bankrupt and debtor's prior testimony, the testimony of that date commencing with the Referee's transcript of November 2, 1950, line 3, page 2, and continuing to line 10, page 17. In this connection it is submitted that it is the duty of the referee as well as counsel for the trustee, and the trustee, where there is reasonable cause to believe that the bankrupt has violated any of the criminal provisions of the Bankruptcy Act to refer the matter

to the U. S. Attorney's office and to the Federal Bureau of Investigation. (Title 11 U.S.C.A. 52.) The remarks of the Referee were made pursuant to his duties as such Referee, and could not possibly be construed as personal bias and prejudice.

It may be noted that counsel on page 11, lines 5 and following of his brief, admits that his Specifications Nos. 4, 5, 6 and 7 of his petition are specifications "turning about the witness" Weinblatt. If it were true, which it is not, that the Referee was personally biased or prejudiced against Mr. Weinblatt, who is not a party to the proceedings other than as a witness called by the trustee under Section 21-A of the Bankruptcy Act, just how that could be construed as personal bias and prejudice against the bankrupt is beyond our comprehension.

With reference to Specification No. 9 set forth in the petition (R. 10), no copies of letters, no names of creditors, have been set forth and it is well settled law that the appointment of a receiver is a matter of discretion with the Court. (11 U.S.C.A. Sec. 725-726.) No review was taken from the order made.

Appellant has cited numerous cases in his brief. In *Whitaker v. McLean*, C.A.D.C., 118 F. (2d) 596, the Court likewise said:

"a bias which develops during the trial and is 'grounded on the evidence' has been held not to be within the terms of Section 21, *Craven v. U.S.*, 1 Cir., 22 F. (2d) 605, certiorari denied, 627, 48 Sup. Ct. 321, 72 L. Ed. 739. Often some degree of bias develops inevitably during a trial. Judges



cannot be forbidden to feel sympathy or aversion for one party or the other. Mild expressions of feeling are as hard to avoid as the feeling itself.”

The instant case, as distinguished from the cases cited by appellant, is not the case of the trier or hearer of the facts passing on the affidavit of personal bias and prejudice against himself as has been the case in practically all of the Federal and United States Supreme Court cases cited by appellant, but is the case of an appeal from a decision of an impartial judge, the Honorable George B. Harris, presiding District Judge, on the petitions alleging personal bias and prejudice and on the record presented to him which, in effect, is the same record presently before this Court. See the case of *J. P. Linahan, Inc.*, 138 Fed. (2d) 650, cited by appellant, for an excellent discussion of what constitutes personal bias and prejudice. A reading of the case of *Craven v. United States*, 22 Fed. (2d) 605, shows it to be in effect very similar to the instant appeal in that the charges of personal bias and prejudice were termed by the Circuit Court of Appeals, First Circuit, “frivolous”.

Appellee therefore urges that upon an analysis of all of the circumstances of alleged personal bias and prejudice on the part of the Referee, four of the specifications of personal bias and prejudice charged to the Referee were remarks not directed at the appellant, the bankrupt, but against the witness Weinblatt; two were made by the Referee in connection with his duties as prescribed by the Bankruptcy Act, and the



three remaining upon analysis and a review of the preceding and following portions of the Referee's transcript of the record, are clearly demonstrated as not being based on personal bias or prejudice, but were the normal remarks any Court or judge would have made under similar circumstances.

We respectfully submit that the order of the District Court appealed from should be affirmed.

Dated, San Francisco, California,  
October 24, 1951.

Respectfully submitted,

DINKELSPIEL & DINKELSPIEL,  
JACOBS, BLANCKENBURG & MAY,  
JAMES M. CONNERS,

*Attorneys for Appellee,*  
*John O. England, Trustee in Bankruptcy.*

No. 13077

---

United States  
Court of Appeals  
For the Ninth Circuit.

---

PAUL W. SAMPSELL, Trustee in Bankruptcy  
of the Estate of Radiophone Corporation,  
Bankrupt,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

Transcript of Record

---

Appeal from the United States District Court,  
Southern District of California,  
Central Division.

FILED

NOV 14 1951

---

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

PAUL P. O'BRIEN  
CLERK



No. 13077

---

United States  
Court of Appeals  
For the Ninth Circuit.

---

PAUL W. SAMPSELL, Trustee in Bankruptcy  
of the Estate of Radiophone Corporation,  
Bankrupt,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

Transcript of Record

---

**Appeal from the United States District Court,  
Southern District of California,  
Central Division.**





## INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Adjudication of Bankruptcy .....	14
Approval of Debtor's Petition and Order of Reference .....	12
Certificate of Clerk .....	40
Claim of United States for Taxes .....	19
Designation of Parts of Record on Appeal....	38
Findings of Fact, Conclusions of Law and Order Thereon .....	25
Motion for Reconsideration of Order Disallow- ing Claim .....	23
Names and Addresses of Attorneys .....	1
Notice of Appeal .....	34
Notice of Motion .....	22
Order Approving Trustee's Bond .....	14
Order Disallowing Claim Filed After Expira- tion of Statutory Period .....	21
Order on Review of Referee's Order Filed May 10, 1950 .....	33
Petition for an Arrangement .....	3
Petition for Review of Referee's Order by Court .....	27

INDEX	PAGE
Points on Which Appellant Intends to Rely and Designation of Parts of the Record to Be Printed .....	42
Referee's Certificate on Review .....	17
Statement of Points on Which Appellant In- tends to Rely .....	36

## NAMES AND ADDRESSES OF ATTORNEYS

### For Appellant:

CRAIG, WELLER & LAUGHARN,  
817, 111 West 7th Street,  
Los Angeles 14, Calif.

### For Appellee:

ERNEST A. TOLIN,  
United States Attorney;  
E. H. MITCHELL, and  
EDWARD R. McHALE,  
Assistants U. S. Attorney;  
EUGENE HARPOLE, and  
JAMES D. PETTUS,  
Special Attorneys,  
Bureau of Internal Revenue,  
600 U. S. Post Office &  
Court House Bldg.,  
Los Angeles 12, Calif.



In the District Court of the United States Southern  
District of California, Central Division

In Bankruptcy, No. 45174-WM

In the Matter of

RADIAPHONE CORPORATION, a Corporation,  
Debtor.

PETITION FOR AN ARRANGEMENT UNDER  
THE PROVISIONS OF CHAPTER XI OF  
THE BANKRUPTCY ACT

To the Honorable Judges of the District Court of  
the United States for the Southern District of  
California, Central Division:

The verified petition of Radiaphone Corporation,  
a corporation, respectfully represents to the Court  
as follows:

I.

That your petitioner was incorporated under and  
by virtue of the laws of the State of California on  
the 3rd day of July, 1946, and has had its principal  
place of business at 1142 Wall Street in the City  
and County of Los Angeles, State of California,  
for the greater portion of the six months last past  
immediately preceding the filing of this petition.

II.

That your petitioner was and is now engaged in  
the manufacturing business and is authorized to file  
a petition under the provisions of Chapter XI of  
the Bankruptcy Act as amended.



## III.

That no bankruptcy proceeding has heretofore been filed by your petitioner and no involuntary petition is now pending against [2\*] your petitioner.

## IV.

That your petitioner is not insolvent. However, it is unable to pay its unsecured debts as they have matured and desires to procure the benefits as provisions of Chapter XI of the Bankruptcy Act.

## V.

That your petitioner, on or about July 3, 1946, obtained all of its assets and effects by a consolidation and reorganization of two corporations then engaged in business, to wit: (1) Radiation Products, Inc., and (2) Pacific Fabricated Products, Inc. That the Radiation Products, Inc., had previously been engaged in business for a period of approximately ten years and the Pacific Fabricated Products, Inc., for a period of approximately one year.

That the gross assets taken over by your petitioner from the Radiation Products, Inc., amounted to \$447,076.02; with liabilities of \$187,142.02. That the said company was then engaged in the manufacturing of electronic equipment.

That the gross assets taken over from the Pacific Fabricated Products, Inc., amounted to \$198,963.00; with liabilities of \$123,657.00. That said company was then engaged in the manufacturing of wood products.

---

\*Page numbering appearing at foot of page of original Certified Transcript of Record.

That after the said consolidation your petitioner then continued to manufacture marine radio transmitters and receivers, together with radio telephones which were used and are used primarily from ship to shore, from ship to ship, etc., and also continued to manufacture and sell home receivers, which consisted of table model radios which were distributed primarily through the retail drug store trade, and that the aforesaid operations were conducted at the plant of the debtor located at 1142 Wall Street in Los Angeles. That in addition to the foregoing your petitioner also continued to manufacture cabinets for the said radios as aforesaid and also household furniture [3] at its plant at 1305 East Valley Boulevard in the City of El Monte, County of Los Angeles, State of California.

That during the period from July 3, 1946, to January 30, 1947, the gross business conducted by your petitioner in actual sales amounted to \$563,-507.04. That your petitioner, however, could have doubled the said business if it had obtained various critical items which went into the manufacturing of the radio transmitters and receivers. That by reason of your petitioner's inability to obtain the said critical items, although it had obtained other numerous items, it was unable to operate its business at more than 50% of capacity and consequently suffered a loss of approximately \$230,000.00.

That the inventory of your petitioner at the present time amounts to approximately \$556,183.64; which consists of raw materials of approximately \$248,000; work in progress of approximately \$65,-

000; and finished merchandise of approximately \$240,000.00.

That your petitioner owns the property where the plants of the debtor are located, as aforesaid.

## VI.

### Debtor's Proposed Plan of Arrangement

#### Article I.

That your petitioner proposes the following plan of arrangement, to wit:

That it be authorized as debtor in possession to maintain, conduct and operate its business under the supervision of this court without a receiver, and it desires to and will pay its debts to its creditors and other parties entitled to any payments, in the following manner and method, to wit:

That it will immediately undertake a vigorous campaign to market and sell its finished products, which should return approximately \$350,000.00. That it should net from the sale of said merchandise \$129,000.00, and your petitioner believes that the same can be accomplished through its regular business channels within a period from ten to fifteen months. That your petitioner also will continue its [4] operation in converting its raw material into finished and saleable merchandise. The raw material and the work in process at the present time amounts to approximately \$313,000.00.

That from its operations, or from a refinancing of your debtor's business, or from a sale of a portion of its assets, your debtor will pay all of its creditors within a period of twenty-four months.

## Article II.

That your petitioner proposes to pay its creditors and other parties in interest in the following manner, to wit:

Class A: The costs and expenses of administration incurred in the proceedings herein, including the debtor's attorney's fees, court costs, etc., together with the claims of creditors entitled to priority as provided in Section 64(a), Subdivisions 2, 4 and 5 of the Bankruptcy Act, within a period of thirty days after the court makes and enters its order approving and confirming this plan of arrangement, with the provision, however, that the parties entitled to such payment as aforesaid may otherwise agree with the debtor to payments on their respective claims over a period of time.

Class B: That the claims of secured creditors will be paid in such manner and method as will be subsequently agreed to by the said secured creditors and the debtor, or in accordance with any order of this court made with respect thereto.

Class C: That the claims of unsecured creditors be divided as follows: (1) Claims of \$500.00 or under; (2) Claims in excess of \$500.00.

It appears from the books and records of the debtor herein that there are a total of 138 unsecured creditors' claims, totaling approximately \$150,000.00. That 84 of said claims appear to be in Subdivision (1) of Class C as aforesaid, totaling \$7,853.86. And it appears that 54 of said claims appear to be in Subdivision (2) of Class C as aforesaid, totaling \$142,146.14. [5]



That in order to expedite the administration, your petitioner proposes to pay the unsecured creditors in Subdivision (1) of Class C, which amount to approximately \$7,853.86, within a period of not to exceed thirty days after the order is made and entered approving and confirming the plan of arrangement herein; in which event said creditors will not be affected by the plan herein and their consent to the same will not be required.

That your debtor proposes that the claims of unsecured creditors in Subdivision (2) of Class C as aforesaid will be paid within a period of not to exceed 24 months and in quarterly installments of not less than  $12\frac{1}{2}\%$ ; the said payments to commence within four months from the entry of the order approving and confirming the plan herein.

### Article III.

That your debtor proposes that the court herein retain jurisdiction of the debtor's property and its operations after the entry of the order approving and confirming the debtor's plan only as long as it is necessary to put into effect the plan herein proposed, and in any event not longer than after the first payment is made to the claims of unsecured creditors in Class C, Subdivision (2) thereof.

### Article IV.

That in the event any claim is in controversy, including and without limiting the claims of prior, secured and unsecured creditors with respect to their respective classifications or the amounts due,



the debtor under order of court may nevertheless proceed to pay other creditors and be restored to possession of its assets during the pendency of a final determination with respect to any such disputed claim, and may make such provisions to protect the rights of such creditor to payment of its claim in such manner as the court may direct.

#### Article V.

That your debtor proposes that it be authorized to sell any portion or all of its assets that it deems advisable to effect and consummate the plan herein proposed, and that while the [6] proceedings are pending before the above-entitled court, such sale or sales shall be made in such manner as the court herein may direct.

#### Article VI.

That your debtor proposes that it be permitted, subject to the approval of the court herein while the proceedings are pending before it, to obtain at any time loans of money and to give securities therefor, either in the form of debtor's certificates, mortgages, or otherwise, and that it be permitted to open escrows and to execute any and all appropriate instruments, documents and papers in connection therewith as may be required to consummate any such loan.

#### VII.

That it is necessary for the speedy and proper administration of the debtor's affairs and the equitable payment of creditors, that all creditors and

parties be enjoined from commencing or prosecuting any suit, foreclosure proceedings in any form or manner, or attempting to remove any property in the possession and under the control of your debtor other than by appropriate proceedings before the above-entitled court.

Wherefore, your petitioner prays that proceedings be had upon this petition in accordance with the provisions of Chapter XI of the Act of Congress relating to bankruptcy, and that all creditors and all other parties be enjoined from commencing or prosecuting any suit in any court or conducting any sale or foreclosure proceedings affecting the property of the debtor, or repossessing or attempting to take possession of any property in the possession or under the control of your petitioner, except by receiving and obtaining appropriate orders from the above-entitled court.

[Seal]

RADIAPHONE  
CORPORATION,

By /s/ REHBOCK LEWIS,  
President.

GEORGE T. GOGGIN, and  
SHEPPARD, MULLEN,  
RICHTER & BALTHIS.

By /s/ GEORGE T. GOGGIN,  
Attorneys for Debtor. [7]

## Certified Copy of Resolution

“Resolved, that the president or secretary of this corporation be and he is hereby authorized on behalf of this corporation to prepare or cause to be prepared a petition for a plan of arrangement under the provisions of Chapter XI of the Bankruptcy Act and to file, or cause the same to be filed, in the District Court of the United States for the Southern District of California, Central Division;

“Resolved, Further, that this corporation employ George T. Goggin and Sheppard, Mullen, Ritcher & Balthis, attorneys at law of Los Angeles, California, licensed to practice in all of the courts of the State of California, as well as the District Court of the United States in and for the Southern District of California, for the purpose of performing any and all of the legal services necessary in connection with the filing of the petition as aforesaid and conducting all subsequent proceedings on behalf of this corporation in connection therewith.”

The undersigned, Rehbock Lewis, hereby certifies that he is the President of the Radiophone Corporation, a corporation, and that the foregoing is a true and correct copy of the resolutions of the Board of Directors adopted at a meeting duly and regularly called on the 1st day of August, 1947.

Dated this 4th day of August, 1947.

/s/ REHBOCK LEWIS,  
President.

[Radiophone Corp. Seal] [8]

State of California,  
County of Los Angeles—ss.

Rehbock Lewis, being by me first duly sworn, deposes and says: that he is the President of the Debtor in the above-entitled action; that he has read the foregoing Petition for an Arrangement under the provisions of Chapter XI of the Bankruptcy Act and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ REHBOCK LEWIS.

Subscribed and sworn to before me this 4th day of August, 1947.

[Seal]     /s/ ESTHER ANDERSON,  
Notary Public in and for the County of Los  
Angeles, State of California.

[Endorsed]: Filed August 5, 1947; U.S.D.C. [26]

---

[Title of District Court and Cause.]

APPROVAL OF DEBTOR'S PETITION AND  
ORDER OF REFERENCE UNDER SEC-  
TION 322 OF THE BANKRUPTCY ACT

At Los Angeles, in said District, on Aug. 5, 1947, before the said Court the petition of Radiaphone Corporation, a corporation, that he desires to obtain

relief under Section 322 of the Bankruptcy Act, and within the true intent and meaning of all the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said petition is hereby approved accordingly.

It is thereupon ordered that said matter be referred to Hubert F. Laugharn, Esq., one of the referees in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said Radiophone Corporation, a corporation, shall attend before said referee on August 12, 1947, and at such times as said referee shall designate, at his office in Los Angeles, California, and shall submit to such orders as may be made by said referee or by this Court relating to said matter.

Witness, the Honorable C. E. Beaumont, Judge of said Court, and the seal thereof, at Los Angeles, in said District, on August 5, 1947.

[Seal]                      EDMUND L. SMITH,  
Clerk.

By /s/ E. M. ENSTROM, JR.,  
Deputy Clerk.

[Endorsed]:    Filed August 5, 1947; U.S.D.C. [27]



[Title of District Court and Cause.]

### ADJUDICATION OF BANKRUPTCY

The said Radiophone Corporation, Debtor, having filed a Petition herein under Chapter XI of the Bankruptcy Act, and said debtor corporation having failed to present a plan of arrangement that was fair or feasible, and the unsecured creditors having requested that an Order of Adjudication be entered herein, and no one objecting thereto, it is

Ajudged that the Radiophone Corporation is a bankrupt under the Act of Congress relating to bankruptcy.

Dated at Los Angeles, California, this 8 day of November, 1947.

/s/ HUBERT F. LAUGHARN,  
Referee in Bankruptcy.

[Endorsed]: Filed Nov. 8, 1947; Referee.

[Endorsed]: Filed Nov. 14, 1947; U.S.D.C. [28]

---

[Title of District Court and Cause.]

### ORDER APPROVING TRUSTEE'S BOND

Know All Men by These Presents:

That we, Paul W. Sampsell, of Los Angeles, California, as Principal and the Saint Paul-Mercury Indemnity Company of Saint Paul, a corporation duly incorporated under the laws of the State of

Delaware, and authorized to act as surety under the Act of Congress approved August 13, 1894, whose principal office is located in Saint Paul, State of Minnesota, as Surety, are held and firmly bound unto the United States of America in the sum of Fifty Thousand & no/100 Dollars (\$50,000.00) in lawful money of the United States, to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves and our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Signed and Sealed this 5th day of November A.D. 1947.

The Condition of This Obligation Is Such, That whereas the above-named Paul W. Sampsell was, on the 5th day of November, A.D. 1947, appointed Trustee in the case pending in bankruptcy in the said Court, wherein Radiophone Corporation is the Bankrupt, and he, the said Paul W. Sampsell has accepted said trust with all the duties and obligations pertaining thereto.

Now, Therefore, if the said Paul W. Sampsell, Trustee as aforesaid, shall obey such orders as said Court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets and effects of the estate of the said Bankrupt which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as said Trustee, then this obligation

to be void; otherwise to remain in full force and virtue.

Signed, sealed and delivered in the presence of:

[Seal]      /s/ HUBERT F. LAUGHARN.

[Seal]      /s/ PAUL W. SAMPSELL.

[Seal]              SAINT PAUL-MERCURY  
                         INDEMNITY COMPANY OF  
                         SAINT PAUL,

By /s/ LUCILE A. TURNER,  
                         Its Attorney-in-fact.

/s/ FRANK C. WELLER,  
                         Attorneys.

Approved this 7th day of November, A.D. 1947.

HUBERT F. LAUGHARN,  
                         Referee in Bankruptcy. [29]

Acknowledgement of Attorney-in-fact

State of California,  
County of Los Angeles—ss.

On this 5th day of November, 1947, before me, a Notary Public, within and for the said County and State, personally appeared Lucile A. Turner, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-Fact of and for the Saint Paul-Mercury Indemnity Company, Saint Paul, Minnesota, a corporation created, organized and existing under and by virtue of the laws of the State of Delaware, and acknowl-

edged to me that he subscribed the name of the Saint Paul-Mercury Indemnity Company thereto as Surety, and his own name as Attorney-in-Fact.

[Seal]      /s/ GEO. C. KETTNER, JR.,  
Notary Public.

My Commission expires.....

[Endorsed]: Filed Nov. 7, 1947; Referee.

[Endorsed]: Filed Nov. 25, 1947; U.S.D.C.

---

[Title of District Court and Cause.]

### REFEREE'S CERTIFICATE ON REVIEW

To the Honorable William C. Mathes, Judge of the  
United States District Court, Southern District  
of California, Central Division:

I, David B. Head, Referee in Bankruptcy, to  
whom the above-entitled matter is now referred,  
certify as follows:

On March 10, 1950, I entered a routine order  
disallowing the claim herein of the Collector of  
Internal Revenue in the amount of \$15,196.35.  
Under the provisions of that order, the creditor was  
given 5 days within which to move for reconsider-  
ation, which he did. The proceedings resulted in the  
findings and order here complained of by the trustee.  
There is no factual dispute.

The question is whether the three months limita-  
tion of sec. 355 of Chapter XI of the Bankruptcy  
Act or the six months provision of sec. 57 n of the

same Act applies to claims of the United States of America.

To my knowledge there are three District Court cases on the subject: *In re Dorb Chemist Pharmacies*, 29 F. Supp. 832 [30] (Southern District of New York), *In re Irwin Service Corp.*, 33 F. Supp. 653 (Western District of New York), and *In re Matisoff* 36 F. Supp. 896 (Northern District of Georgia). In all three of these cases, referees had held that sec. 355 applied and in all three cases they were reversed. I had some doubts about the correctness of these decisions until the case of *In re Marine Stevedoring Corp.*, 169 F. 2d 554, was decided. In that case the Circuit Court of Appeals for the Third Circuit reversed both the referee and the District Court, holding that sec. 57 n and not sec. 355 applied to claims of the United States of America. That case has settled my doubts. I have followed the rule of the reported cases in my conclusions in this case.

I further certify the following documents:

1. Claim of the Collector of Internal Revenue.
2. Order of March 10, 1950.
3. Motion for Reconsideration.
4. Findings, Conclusions and Order of May 10, 1950.
5. Petition for Review.

Dated May 24, 1950.

Respectfully submitted,

/s/ DAVID B. HEAD,

Referee in Bankruptcy. [31]



[Title of District Court and Cause.]

# CLAIM OF UNITED STATES FOR TAXES

State of California,  
County of Los Angeles—ss.

Harry C. Westover, Collector of Internal Revenue for the Sixth Collection District of California, a duly authorized agent for the United States in this behalf, being duly sworn, deposes and says: (1) That the above-named is justly and truly indebted to the United States in the sum of \$13,575.18, with Interest and/or Penalties thereon as hereinafter stated; and (2) That the nature of the said debt is internal revenue taxes due pursuant to law as follows:

Nature of Tax	Period	Tax	Assessed Liability Penalty	Interest	Accrued Interest to 3-15-48	5% Penalty
Add'l Federal Unemployment	1947	18.58		.03	.10	
Pacific Faricated Products, Inc. Deficiency Inc.	1945	2,004.12			240.49	
Deficiency Excess Profits	1945	11,456.55			1,374.79	
Deficiency Inc.	1 1 to 7 3 46	95.93			5.76	
		<u>13,575.18</u>		<u>.03</u>	<u>1,621.14</u>	
Total: 15,196.35						

Further interest will accrue on the above taxes, viz., \$13,575.18, at the rate of 6% per annum, or 2.23 per day, from March 15, 1948, until paid.

The basis of the above deficiencies in income and excess profits is set out in Form 7900 letter addressed to the debtor in care of Paul W. Sampsell, Trustee, under date of February 24, 1948.

(3) That no part of said debt has been paid, but that the same is now due and payable at the office of the Collector of Internal Revenue at Los Angeles, California;

(4) That there are no set-offs or counterclaims to said debt; (5) That the United States does not hold, and has not, nor has any person by its order, or to deponent's knowledge or belief, for its use, had or received any security or securities for said debt, except statutory liens; (6) That the said indebtedness is now due and payable; That no note or other negotiable instrument has been received for said debt or any part thereof; and that no judgment has been rendered thereon; (7) That said debt has priority, and must be paid in advance of distributions to creditors, as and to the extent provided in Section 64a(4) and/or Section 659 of the Bankruptcy Act, and/or Sections 3466 of the Revised Statutes, or other applicable provisions of law.

Attention is also called to the provisions of Section 3467 of the Revised Statutes, with respect to the personal liability of every executor, administrator, assignee or other person who fails to pay the claims of the United States in accordance with their priority.

Dated this 27th day of February, 1948.

/s/ HARRY C. WESTOVER,  
Collector of Internal Revenue for the Sixth District  
of California.

Subscribed and sworn to before me this 27th day of February, 1948.

[Seal]     /s/ HARRIETT HAYES.

My commission expires 11/11/51.

[Endorsed]: Filed March 1, 1948; Referee. [32]

[Title of District Court and Cause.]

ORDER DISALLOWING CLAIM FILED  
AFTER EXPIRATION OF STATUTORY  
PERIOD

Paul W. Sampsell, the trustee herein, having called to the attention of the Court the fact that the following claim, to wit:

Name: Collector of Internal Revenue

Address: Legal Section

Federal Building

Los Angeles 14, California

\$15,196.35

was filed herein on March 1, 1948, after the expiration of the statutory period of time for filing claims herein and that no claim was filed within the said period by the within creditor, now, therefore, upon motion of the said trustee, the Referee makes the following order:

It Is Ordered that the said claim be and the same hereby is disallowed. The said claim, however, is entitled to allowance under the provisions of Section 57n of the Bankruptcy Act against any

surplus remaining which may remain in the said case, if any, after the payment of claims which have been filed and allowed within the statutory period.

It Is Further Ordered that the said trustee serve by United States mail, postage prepaid, a copy of the within order upon the said creditor or upon the holder of any power of attorney in connection therewith and the said creditor may have a period of five days thereafter within which to move for reconsideration of the said order.

Dated March 10, 1950.

/s/ DAVID B. HEAD,  
Referee in Bankruptcy.

[Endorsed]: Filed March 10, 1950; Referee. [33]

[Title of District Court and Cause.]

#### NOTICE OF MOTION

To: Paul W. Sampsell and to Craig, Weller & Laugharn, his counsel:

You, and Each of You, Will Please Take Notice that the United States of America will move the Referee to reconsider his Order of March 10, 1950, disallowing the claim filed by the Collector of Internal Revenue in the above-entitled proceeding on March 1, 1948, at his court room in the United States Post Office and Court House Building at Temple and Spring Streets in the City of Los Angeles, State of California, at 10:00 a.m. on the

30th day of March, 1950, or as soon thereafter as counsel can be heard.

Dated This 14th day of March, 1950.

ERNEST A. TOLIN,  
United States Attorney;

E. H. MITCHELL, and  
EDWARD R. McHALE,  
Assistant U. S. Attorneys;

EUGENE HARPOLE, and  
JAMES D. PETTUS,  
Special Attorneys, Bureau of  
Internal Revenue;

By /s/ JAMES D. PETTUS,  
Attorneys for United States  
of America.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 14, 1950; Referee. [34]

[Title of District Court and Cause.]

MOTION FOR RECONSIDERATION OF  
ORDER DISALLOWING CLAIM

Comes Now the United States of America and moves the Court to reconsider the order of the 10th day of March, 1950, disallowing the claim of the Collector of Internal Revenue for the Sixth Collection District of California filed in the above-entitled proceeding on March 1, 1948, in the sum of \$15,196.35, for the following reason:



1. The United States is not bound by the three-month limitation on filing of claims provided for by Section 355 of the Bankruptcy Act, as amended, inasmuch as it is not mentioned specifically in that section.

In re Dorb Chemist Pharmacies,

29 Fed. Supp. 832.

In re Ervin Service Corporation,

33 Fed. Supp. 653.

In re Matisoff,

36 Fed. Supp. 896.

In re Marine Stevedoring Corp.,

169 F(2d) 854.

ERNEST A. TOLIN,

United States Attorney;

E. H. MITCHELL, and

EDWARD R. McHALE,

Assistant U. S. Attorneys;

EUGENE HARPOLE, and

JAMES D. PETTUS,

Special Attorneys, Bureau of  
Internal Revenue;

By /s/ JAMES D. PETTUS,

Attorneys for United States  
of America.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 14, 1950; Referee. [35]

The United States District Court Southern District  
of California Central Division

No. 45,174-WM

In the Matter of  
RADIAPHONE CORPORATION,  
Bankrupt.

FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND ORDER THEREON

The motion of the United States of America for Reconsideration of the Order of the Referee disallowing the claim, came on regularly for hearing before the Honorable David B. Head, Referee in Bankruptcy, on April 26, 1950, at the hour of 2 o'clock p.m. The United States of America was represented by and through its counsel Ernest A. Tolin, United States Attorney for the Southern District of California, E. H. Mitchell and Edward R. McHale, Assistant United States Attorneys for said District, and Eugene Harpole and Frank W. Mahoney, Special Attorneys, Bureau of Internal Revenue, and the trustee, Paul W. Sampsell, was represented by his counsel Craig, Weller and Laugharn, by A. J. Bumb.

The Referee, after hearing the facts and argument presented, finds that:

I.

Radiaphone Corporation filed a petition under section 322 of the Bankruptcy Act on August 5, 1947.

## II.

An order adjudicating Radiophone Corporation a bankrupt was [37] entered November 88, 1947. The first date set for the first meeting of creditors after the adjudication was November 26, 1947.

## III.

The claim of the Collector of Internal Revenue herein was filed on the 1st day of March, 1948, for the sum of \$15,196.35, which date of filing was more than three months after the first date set for the First Meeting of Creditors after the Adjudication, but less than six months after the first date set for the First Meeting of Creditors.

## CONCLUSIONS OF LAW

## I.

The provisions of section 355 of the Bankruptcy Act providing for a three month limitation on filing of claims does not apply to the United States of America.

## II.

The claim of the Collector of Internal Revenue was filed within the six month period provided by section 57(n) of the Bankruptcy Act.

## ORDER

It is hereby ordered that the said Order disallowing the claim of the Collector of Internal Revenue

for \$15,196.35 entered March 10, 1950, be, and the same is, hereby set aside.

Dated this 15th day of May, 1950.

/s/ DAVID B. HEAD,  
Referee in Bankruptcy.

Approved as to form:

CRAIG, WELLER &  
LAUGHARN,

By /s/ A. J. BUMB,  
Attorneys for Trustee.

[Endorsed]: Filed May 10, 1950; Referee. [38]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S  
ORDER BY COURT

To the Honorable David B. Head, Referee in  
Bankruptcy:

The verified petition of Paul W. Sampsell, respectfully shows:

I.

That he is the duly elected, qualified and acting Trustee in the above-entitled bankruptcy proceedings.

II.

That on the 10th day of March, 1950, an order was signed by the Referee disallowing claim filed by the Collector of Internal Revenue after the

period prescribed in Section 355 of the Act of Congress relating to bankruptcy.

### III.

That a motion was made by the United States of America for reconsideration of the order of the Referee disallowing the said claim, and the hearing coming on before the Honorable David B. Head, Referee in bankruptcy, on the 26th day of April, 1950, at the hour of 2:00 p.m., and your petitioner appearing through his counsel, Craig, Weller & Laugharn, by A. J. Bumb, and participating [39] in said hearing, and thereupon an order was entered on the 10th day of May, 1950, granting the prayer of the said motion as follows:

“The United States District Court Southern District  
of California Central Division

“No. 45,174-WM

“In the Matter of

“RADIAPHONE CORPORATION,

“Bankrupt.

### “FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER THEREON

“The motion of the United States of America for Reconsideration of the Order of the Referee disallowing the claim, came on regularly for hearing before the Honorable David B. Head, Referee in Bankruptcy, on April 26, 1950, at the hour of 2 o'clock p.m. The United States of America was represented by and through its counsel Ernest A.



Tolin, United States Attorney for the Southern District of California, E. H. Mitchell and Edward R. McHale, Assistant United States Attorneys for said District, and Eugene Harpole and Frank W. Mahoney, Special Attorneys, Bureau of Internal Revenue, and the trustee, Paul W. Sampsell, was represented by his counsel Craig, Weller and Laugharn, by A. J. Bumb.

“The Referee, after hearing the facts and argument presented, finds that:

“I.

“Radiaphone Corporation filed a petition under section 322 of the Bankruptcy Act on August 5, 1947.

“II.

“An order adjudicating Radiaphone Corporation a bankrupt was entered November 8, 1947. The first date set for the first meeting of creditors after the adjudication was November 26, 1947. [40]

“III.

“The claim of the Collector of Internal Revenue herein was filed on the 1st day of March, 1948, for the sum of \$15,196.35, which date of filing was more than three months after the first date set for the First Meeting of Creditors after the Adjudication, but less than six months after the first date set for the First Meeting of Creditors.

**“CONCLUSIONS OF LAW****“I.**

“The provisions of section 355 of the Bankruptcy Act providing for a three month limitation on filing of claims does not apply to the United States of America.

**“II.**

“The claim of the Collector of Internal Revenue was filed within the six month period provided by section 57(a) of the Bankruptcy Act.

**“ORDER**

“It is hereby ordered that the said Order disallowing the claim of the Collector of Internal Revenue for \$15,196.35 entered March 10, 1950, be, and the same is, hereby set aside.

“Dated This 10th day of May, 1950.

“DAVID B. HEAD,

“Referee in Bankruptcy.

“Approved as to form:

“CRAIG, WELLER &  
LAUGHARN,

“By A. J. BUMB,

“Attorneys for Trustee.”

**IV.**

That the said Order is erroneous for the following reasons: [41]

(a) That the decision herein is contrary to the

principles of law set forth in the Act of Congress relating to Bankruptcy.

(b) That the Collector of Internal Revenue is a creditor of the within bankrupt, and as such is bound by Section 355 of Chapter XI and Section 57-n of the aforementioned Act.

(c) That the claim of the Collector of Internal Revenue must be filed within the same period of time as those claims of other creditors; that the original petition under Chapter XI was filed on the 5th day of August, 1947; that the Order of Adjudication was entered on the 8th day of November, 1947; that the first date set for the First Meeting of Creditors was the 26th day of November, 1947; that the final date for filing of claims was the 26th day of February, 1948; that the claim of the Collector of Internal Revenue was filed on the 1st day of March, 1948.

(d) That there is no provision in the Act of Congress relating to Bankruptcy granting to the Collector of Internal Revenue any right, privilege, or power greater than those possessed by the other creditors, except as in the *provisio* of Section 57-n of the aforesaid act, which states:

“That the Court may upon application, before the expiration of such period and for cause shown, grant a reasonable fixed extension of time for the filing of claims by the United States or any state or sub-division thereof”;

that no such application was made herein by the Collector of Internal Revenue.

(e) That the Collector of Internal Revenue is bound by the provisions of Section 355 of the aforementioned act, as the United States government is expressly mentioned in Section 57-n of the said Act which states that any and all claims in any proceedings under this act must be filed as prescribed in the said Section 57-n, or as prescribed in any amendment to the said Section 57-n. As Section 355 is merely an amendment of Section 57-n, the specific [42] enumeration of the United States in Section 57-n is automatically read into Section 355.

(f) That the decision of the Court is contrary to Congressional intent in the matter.

Wherefore, your petitioner prays for a review of the said Order by the above-entitled Court, and that said Order be vacated and set aside.

/s/ PAUL W. SAMPSELL,  
Trustee in Bankruptcy.

CRAIG, WELLER &  
LAUGHARN,

By /s/ A. J. BUMB,  
Attorneys for Trustee. [43]

United States of America,  
Southern District of California—ss.

Paul W. Sampsell, being by me first duly sworn, deposes and says: that he is petitioner in the above-entitled action; that he has read the foregoing Petition for Review of Referee's Order by Court and knows the contents thereof: and that the same

is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

/s/ PAUL W. SAMPSELL.

Subscribed and Sworn to before me this 18th day of May, 1950.

[Seal]     /s/ BESS A. ALDRICH,  
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed May 23, 1950; Referee.

[Referee's Certificate on Review, Endorsed]:  
Filed May 24, 1950; U.S.D.C. [44]

---

United States District Court for the Southern  
District of California Central Division

In Bankruptcy No. 45,174-WM

In the Matter of  
RADIAPHONE CORPORATION,

Bankrupt.

ORDER ON REVIEW OF REFEREE'S  
ORDER FILED MAY 10, 1950

Upon the petition for review filed May 23, 1950, by the trustee; upon the certificate of Referee David B. Head filed May 24, 1950; upon the proceedings before the referee as appear from his certificates; and it appearing to the court that §355 of the Bank-



ruptcy Act [11 U.S.C. §755] providing for the filing of claims “within three months after the first date set for the first meeting of creditors . . . “does not govern claims filed by the United States [New York v. Irving Trust Co., 288 U.S. 329, 331 (1933); 8 Collier, Bankruptcy 1016 (14th ed. 1941)];

It Is Now Ordered that the referee's order filed May 10, 1950, setting aside the “Order disallowing the claim of the Collector” be and is hereby confirmed.

It Is Further Ordered that the Clerk this day serve copies of this order on Referee David B. Head; attorneys for the trustee; and attorneys for the Collector [45] of Internal Revenue.

June 19, 1951.

/s/ WM. C. MATHES,

United States District Judge.

[Endorsed]: Filed June 19, 1951; U.S.D.C. [46]

---

[Title of District Court and Cause.]

#### NOTICE OF APPEAL

To Ernest A. Tolin, United States Attorney; E. H. Mitchell and Edward R. McHale, Assistant United States Attorneys; Eugene Harpole and Frank W. Mahoney, Special Attorneys, Bureau of Internal Revenue, and Robert A. Riddell, the Collector of Internal Revenue of the United States:

Notice Is Hereby Given that the undersigned, Paul W. Sampsell, as Trustee in Bankruptcy for the estate of Radiophone Corporation, Bankrupt, through his attorneys, Messrs. Craig, Weller & Laugharn, A. J. Bumb of counsel, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from that certain order made and entered dated June 19, 1951, by Honorable William C. Mathes, United States District Judge, affirming a certain order of Referee in Bankruptcy David B. Head, dated May 10, 1950, setting aside an Order Disallowing Claim of Collector of Internal Revenue, and from each and every part thereof, and will ask said Court of Appeals for the Ninth Circuit to reverse the order of the District Court complained of herein.

Dated at Los Angeles, in the Southern District of California, this 17th day of July, 1951.

CRAIG, WELLER &  
LAUGHARN,

By /s/ A. J. BUMB,  
Attorneys for Trustee.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 17, 1951; U.S.D.C. [47]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH  
APPELLANT INTENDS TO RELY

The trustee in the above-captioned matter, also the appellant herein, sets forth the following points on which he intends to rely on appeal:

Point I.

That the District Judge erred in affirming the order of Referee David B. Head, allowing the claim of the Collector of Internal Revenue as a valid, timely filed claim in the within bankrupt estate.

Point II.

That the District Judge erred in refusing to reverse the order of the Referee and in refusing to disallow the claim of the Collector of Internal Revenue as a claim in the within bankrupt estate, as the said claim was not filed within the statutory period provided therefor.

Point III.

That the District Judge erred in concluding that the 1938 Amendment of Section 57(n) of the Bankruptcy Act does not prohibit the allowing of the claim of the said Collector of Internal Revenue.

Point IV.

That the District Judge erred in not concluding that Section 355 of the Bankruptcy Act was an Amendment of, or Supplement to Section 57(n) of the Bankruptcy Act. [48]

## Point V.

That the District Judge erred in not utilizing the approved rules of statutory interpretation in construing Section 57(n) and Section 355 of the Bankruptcy Act.

## Point VI.

That the District Judge erred in concluding that the present problem was controlled by *New York v. Irving Trust Co.*, 288 U.S. 329 (1933), which case was decided prior to the 1938 Amendment of the Bankruptcy Act.

## Point VII.

That the District Judge erred in failing to conclude that the Collector of Internal Revenue of the United States of America is specifically designated as being subject to the provisions of Section 355 of the Bankruptcy Act.

CRAIG, WELLER &  
LAUGHARN,

By /s/ A. J. BUMB,

Attorneys for Trustee and  
Appellant.

[Endorsed]: Filed July 17, 1951; U.S.D.C. [49]

[Title of District Court and Cause.]

DESIGNATION OF PARTS OF RECORD  
ON APPEAL

To Edmund L. Smith, Clerk of the Above-Named  
Court:

You are hereby requested to prepare, certify, and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, with reference to the notice of appeal heretofore filed by the trustee in the above-entitled matter, transcript of record in the above-entitled matter, prepared and transmitted as required by law and by rules of said court, and to include in said transcript of record the following documents, or certified copies thereof, to wit:

1. Petition for an Arrangement under the provisions of Chapter XI of the Bankruptcy Act of Radiophone Corporation, debtor, in Case No. 45,174-WM.

2. Approval of debtor's petition and order of reference under Section 322 of the Bankruptcy Act.

3. Order of Adjudication of bankrupt.

4. Order Approving Trustee's Bond.

5. Order fixing date for the First Meeting of Creditors.

6. Affidavit of Mailing Notice of First Meeting of Creditors.

7. Claim of the Collector of Internal Revenue filed on [50] March 1, 1948, for the sum of \$15,196.35.



8. Order of March 10, 1950, disallowing claim filed after expiration of Statutory Period.

9. Motion for reconsideration of order disallowing claim.

10. Notice of Motion.

11. Findings of Fact, Conclusions of Law and Order thereon of May 10, 1950.

12. Petition for Review of Referee's Order filed May 23, 1950.

13. Referee's Certificate on Review dated May 24, 1950.

14. Order of Review of Referee's Order filed May 10, 1950, affirming Referee's Order, District Judge William C. Mathes.

15. Notice of Appeal.

16. Points upon which appellant intends to rely on appeal.

17. Designation of Parts of Record on Appeal.

CRAIG, WELLER &  
LAUGHARN,

By /s/ A. J. BUMB,

Attorneys for Trustee and  
Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 17, 1951; U.S.D.C. [51]

[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered from 1 to 52, inclusive, contain the original Petition for an Arrangement Under Chapter XI of the Bankruptcy Act and Schedules; Approval of Debtor's Petition and Order of Reference; Adjudication of Bankruptcy; Bond of Trustee and Order of Approval; Referee's Certificate on Review; Claim of United States for Taxes; Order Disallowing Claim Filed After Expiration of Statutory Period; Notice of Motion and Motion for Reconsideration of Order Disallowing Claim; Findings of Fact, Conclusions of Law and Order Thereon; Petition for Review; Order on Review of Referee's Order Filed May 10, 1950; Notice of Appeal; Statement of Points on Appeal and Designation of Record on Appeal which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00, which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 24th day of August, A.D. 1951.

[Seal]     /s/ EDMUND L. SMITH,  
Clerk.

[Endorsed]: No. 13077. United States Court of Appeals for the Ninth Circuit. Paul W. Sampsell, Trustee in Bankruptcy of the Estate of Radiophone Corporation, Bankrupt, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed August 27, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 13077

In the Matter of:  
RADIAPHONE CORPORATION,  
Bankrupt.

POINTS ON WHICH APPELLANT INTENDS  
TO RELY AND DESIGNATION OF PARTS  
OF THE RECORD TO BE PRINTED

To Paul P. O'Brien, Clerk of the Above-Named  
Court:

Points on Which Appellant Intends to Rely

The undersigned attorneys for the Trustee and Appellant herein do hereby designate the following as the points on which the Trustee and Appellant intend to rely on appeal:

Point I.

That the District Judge erred in affirming the order of Referee David B. Head, allowing the claim of the Collector of Internal Revenue as a valid, timely filed claim in the within bankrupt estate.

Point II.

That the District Judge erred in refusing to reverse the order of the Referee and in refusing to disallow the claim of the Collector of Internal Revenue as a claim in the within bankrupt estate, as the said claim was not filed within the statutory period provided therefor.

## Point III.

That the District Judge erred in concluding that the 1938 Amendment of Section 57(n) of the Bankruptcy Act does not prohibit the allowing of the claim of said Collector of Internal Revenue.

## Point IV.

That the District Judge erred in not concluding that Section 355 of the Bankruptcy Act was an Amendment of, or Supplement to, Section 57(n) of the Bankruptcy Act.

## Point V.

That the District Judge erred in not utilizing the approved rules of statutory interpretation in construing Section 57(n) and Section 355 of the Bankruptcy Act.

## Point VI.

That the District Judge erred in concluding that the present problem was controlled by *New York v. Irving Trust Co.*, 288 U.S. 329 (1933), which case was decided prior to the 1938 Amendment of the Bankruptcy Act.

## Point VII.

That the District Judge erred in failing to conclude that the Collector of Internal Revenue of the United States of America is specifically designated as being subject to the provisions of Section 355 of the Bankruptcy Act.



Designation of Parts of the Record  
to Be Printed

The undersigned attorneys for the Trustee and Appellant herein do hereby designate the parts of the record certified up by the Clerk of the District Court of the United States for the Southern District of California as being the parts of the record to be printed on appeal in this Court:

District Court  
Clerk's Record

1. Petition for an Arrangement under the provisions of Chapter XI of the Bankruptcy Act of Radiophone Corporation, debtor, in Case No. 45,174-WM.....P. 2

Please print caption in the Petition for an Arrangement, but in all subsequent proceedings in the bankruptcy proceeding of Radiophone Corporation omit the formal caption, merely designating it by number and "title of Court and Cause."

2. Approval of Debtor Petition and Reference under Section 322 of the Bankruptcy Act .....P. 27
3. Order of Adjudication of bankrupt.....P. 28
4. Order approving Trustee's bond .....P. 29
5. Claim of the Collector of Internal Revenue filed on March 1, 1948, for the sum of \$15,196.35 .....P. 32
6. Order of March 10, 1950, disallowing claim filed after expiration of Statutory Period .....P. 33

District Court  
Clerk's Record

7. Motion for reconsideration of order dis-allowing claim .....P. 35
8. Notice of Motion .....P. 34
9. Findings of Fact, Conclusions of Law and Order thereon of May 10, 1950.....P. 37
10. Petition for Review of Referee's Order filed May 23, 1950.....P. 39
11. Referee's Certificate on Review dated May 24, 1950 .....P. 30
12. Order of Review of Referee's Order filed May 10, 1950, affirming Referee's Order, District Judge William C. Mathes.....P. 45
13. Notice of Appeal .....P. 47
14. Points on which Appellant intends to rely on appeal .....P. 48
15. Designation of Parts of Record on Appeal .....P. 50

Dated August 21st, 1951.

CRAIG, WELLER &  
LAUGHARN,

By /s/ A. J. BUMB,  
Attorneys for Trustee and  
Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Sept. 27, 1951; U.S.C.A.



No. 13077

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate  
of Radiophone Corporation, Bankrupt,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

## OPENING BRIEF OF APPELLANT.

---

CRAIG, WELLER & LAUGHARN,  
HUBERT F. LAUGHARN,  
THOMAS S. TOBIN,  
A. J. BUMB,

111 West Seventh Street,  
Los Angeles 14, California,

*Attorneys for Appellant*

FILED

NOV 20 1951





## TOPICAL INDEX

	PAGE
Jurisdictional statement .....	2
Statement of case.....	3
Specifications of error.....	4
Argument, points and authorities.....	6

### I.

In arriving at a true and logical solution to the problem here- in presented, due consideration must be given to the various rules of statutory interpretation.....	7
A. The Bankruptcy Act is entitled to a liberal construction in favor of the bankrupt.....	7
B. The Bankruptcy Act should receive a practical, rea- sonable interpretation, in order to promote the object of the law.....	7
C. Absurd, unreasonable constructions, and those which impose mischievous results, should be avoided.....	8
D. The legislative intent and history of the act may be considered .....	8
E. Specific provisions should not be treated abstractly. Every section, sub-section and provision should be con- strued together in order to ascertain the true legislative intent .....	8
F. In the construing of a statute, later amendments there- to cannot be ignored.....	8
G. A change in the phraseology of a statute re-enacted creates a presumption of a change of intent, of the legislative body, from that expressed in the former statute .....	8

II.

The intent of Congress is that the United States, its officers, agents and bureaus, as a claimant, be bound by Section 355 of the Bankruptcy Act.....	10
---	----

III.

The court's construing of Section 355 of the Bankruptcy Act in the Marine Stevedoring case (In re Marine Stevedoring Corp. (C. C. A. 3d, 1948), 169 F. 2d 554), is unreasonable and brings about an illogical result not intended by Congress	15
---	----

IV.

The principle of law propounded by the court in the Irving Trust Company case (New York v. Irving Trust Company, 288 U. S. 329, 53 S. Ct. 389, 77 L. Ed. 815) is not now applicable in a present construing of Section 57-n or Section 355 of the Bankruptcy Act.....	21
---	----

V.

A logical construing of the pertinent sections of the Bankruptcy Act, 355 and 57-n, unequivocally demonstrates that the United States, its officers, agents and bureaus as a claimant is specifically bound by the said Section 355.....	23
--	----

Conclusion .....	26
------------------	----

## TABLE OF AUTHORITIES CITED

CASES	PAGE
Broughton v. Humble Oil Co., 105 S. W. 2d 480.....	25
Buckett v. Columbia Bank, 195 U. S. 345, 49 L. Ed. 231, 25 S. Ct. 38.....	8
City of New York v. Saper, 336 U. S. 328, 93 L. Ed. 710, 69 S. Ct. 554.....	14
Crawford v. Burke, 195 U. S. 176, 49 L. Ed. 147.....	8
Credit Service, Inc., Matter of, 49 Am. B. R. (N. S.) 796, 38 Fed. Supp. 761.....	18
Dilworth v. Boothe, 69 F. 2d 621.....	7
Dorb the Chemist Pharmacies, Inc., In re, 43 Am. B. R. (N. S.) 688, 29 Fed. Supp. 832.....	15, 16, 17, 18
Fink v. O'Neil, 106 U. S. 272, 27 L. Ed. 196, 1 S. Ct. 325....	22
Guarantee Co. v. Title Guaranty Co., 224 U. S. 152, 56 L. Ed. 706, 32 S. Ct. 457.....	22
Holt v. Henley, 232 U. S. 637, 58 L. Ed. 767, 34 S. Ct. 459.....	8
Inhabitants of Whiting v. Inhabitants of Lubec, 121 Me. 121, 115 Atl. 896.....	21
Knox-Powell-Stockton Co., In re, 100 F. 2d 997.....	22
Marine Stevedoring Corp., In re, 169 F. 2d 554.....	6, 17, 20
Maynard v. Elliott, 283 U. S. 273, 75 L. Ed. 1028, 51 S. Ct. 390 .....	7
New York v. Irving Trust Company, 288 U. S. 329, 53 S. Ct. 389, 77 L. Ed. 815.....	5, 6, 21
Peck, et al. v. Jenness, et al., 48 U. S. 612, 12 L. Ed. 841.....	8
Scott, In re, 126 Fed. 981.....	7
Spier v. Sytsma, 56 F. 2d 520.....	7
Summers v. Collector of Taxes, 92 F. 2d 819.....	8
United States v. Herron, 87 U. S. 251, 22 L. Ed. 275.....	21
West v. Lea Bros., 174 U. S. 590, 43 L. Ed. 1098, 19 S. Ct. 839	8

MISCELLANEOUS	PAGE
House Report 1409, 75th Cong., 1st Sess.....	11
Senate Reports 1916, 75th Cong., 3d Sess., Calendar No. 2022, p. 2 .....	12
Senate Reports 1916, 75th Cong., 3d Sess., Calendar No. 2022, p. 5 .....	13

## STATUTES

Bankruptcy Act, Sec. 2-a(1).....	2
Bankruptcy Act, Sec. 2-a(2).....	2
Bankruptcy Act, Sec. 12 (old).....	10
Bankruptcy Act, Sec. 24-a.....	2
Bankruptcy Act, Sec. 39-c.....	2
Bankruptcy Act, Sec. 55 .....	15, 17, 24
Bankruptcy Act, Sec. 57-n.....	5, 6, 7, 9, 10, 14, 16 17, 19, 22, 23, 24, 25
Bankruptcy Act, Sec. 57-n.....	19
Bankruptcy Act, Sec. 63 .....	15, 20, 24
Bankruptcy Act, Sec. 63-a(1).....	14
Bankruptcy Act, Sec. 64-a(4).....	10
Bankruptcy Act, Sec. 63-a(5).....	14
Bankruptcy Act, Sec. 67-d.....	22
Bankruptcy Act, Sec. 302 .....	15
Bankruptcy Act, Sec. 322.....	1, 2, 3, 17
Bankruptcy Act, Sec. 355.....	1, 5, 6, 7, 8, 14, 15, 16 17, 18, 19, 20, 22, 23, 24, 25
Bankruptcy Act, Sec. 378(2) .....	15

## TEXTBOOKS

8 Collier on Bankruptcy (14th Ed.), p. 1013, Note 43, Analysis of H. R. 12889, 74th Cong., 2d Sess. (1936), 180.....	11
8 Collier on Bankruptcy (14th Ed., 1940), p. 1017.....	14
8 Collier on Bankruptcy (14th Ed.), p. 1018.....	18
2 Sutherland, Statutory Construction (3rd Ed.), p. 481.....	8

No. 13077

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate  
of Radiophone Corporation, Bankrupt,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

## OPENING BRIEF OF APPELLANT.

---

This is an appeal from an order of the District Court of the United States for the Southern District of California, Honorable William C. Mathes, Judge, affirming an order made by Referee in Bankruptcy, David B. Head, allowing the claim of the Collector of Internal Revenue in and for the Sixth Collection District of California, which claim was not filed as per section 355 of the Bankruptcy Act, within three months after the first date set for the first meeting of creditors following the entry of an Order of Adjudication made in these proceedings, which were originally filed under section 322 of Chapter XI of the Bankruptcy Act.



### **Jurisdictional Statement.**

The original jurisdiction of the District Court was invoked by the bankrupt under sections 322 and 2-a(1) of the Bankruptcy Act by its filing a petition for an arrangement under the provisions of the said sections of the said Act [Tr. pp. 3 to 12].

The summary jurisdiction of the Referee to pass upon the allowability of the claim of the Collector of Internal Revenue for the Sixth Collection District of California filed in the within proceedings [Tr. pp. 19 to 20], was invoked under section 2-a(2) of the Bankruptcy Act, first by the trustee requesting the Referee to enter an "Order Disallowing Claim Filed After Expiration of Statutory Period" [Tr. pp. 21 to 22], and second, by the United States of America in filing its "Motion For Reconsideration of Order Disallowing Claim" [Tr. pp. 23 to 24].

The jurisdiction of the District Court on review was invoked by the trustee in filing his "Petition For Review of Referee's Order By Court" [Tr. pp. 27 to 33], under section 39-c of the Bankruptcy Act, directed toward the Referee's "Findings of Fact, Conclusions of Law and Order Thereon" [Tr. pp. 25 to 26], which order did set aside the Referee's previous "Order Disallowing Claim Filed After Expiration of Statutory Period" [Tr. pp. 21 to 22].

The jurisdiction of this, the Court of Appeals of the United States for the Ninth Circuit, was invoked by the trustee herein under section 24-a of the Bankruptcy Act, by the "Notice of Appeal" [Tr. pp. 34 to 35] filed by the

trustee herein, directed toward that "Order On Review of Referee's Order Filed May 10, 1950" [Tr. pp. 33 to 34], which order affirmed the Referee's "Findings of Fact, Conclusions of Law and Order Thereon" [Tr. pp. 25 to 27].

### **Statement of Case.**

The bankrupt herein, on August 5, 1947, filed its original Petition for Arrangement under the provisions of section 322 of Chapter XI of the Bankruptcy Act [Tr. pp. 3 to 12]. The said Petition having been approved and referred to the Referee on August 5, 1947 [Tr. pp. 12 to 13], and a plan of arrangement not having been presented, an order of adjudication was entered by the Referee on November 8, 1947 [Tr. p. 14].

Paul W. Samsell, having been elected Trustee and having qualified by the filing of his required bond, which was approved by the Referee [Tr. pp. 14 to 17], called to the Referee's attention the fact that the claim of the Collector of Internal Revenue of the Sixth Collection District of California [Tr. pp. 19 to 20] had been filed on March 1, 1948, and beyond the three-month period after the first date set for the first meeting of creditors after the entry of an Order for Adjudication as prescribed in section 355 of the Bankruptcy Act [Tr. p. 26]. An order was then entered by the Referee on March 10, 1950, disallowing the said claim because it was filed after the said statutory period [Tr. pp. 21 to 22].

Thereafter, the United States of America, on behalf of the said claimant, on March 14, 1950, filed a motion for

reconsideration of the said order [Tr. pp. 23 to 24], and gave the trustee notice thereof [Tr. pp. 22 to 23]. After a hearing on the said motion the Referee, on May 15, 1950, entered an order setting aside his previous order disallowing the said claim and, in effect, allowing the said claim as a timely filed claim [Tr. pp. 25 to 27].

Within the time prescribed by section 39-c of the Bankruptcy Act the trustee, on May 23, 1950, filed his petition for review of the said Referee's order [Tr. pp. 27 to 33]. The hearing on the said petition for review was held before the Honorable William C. Mathes, United States District Judge, and on June 19, 1951, an order affirming the order of the Referee allowing the said claim was entered [Tr. pp. 33 to 34]. From this order the trustee timely appealed [Tr. pp. 34 to 35].

### **Specifications of Error.**

#### **I.**

That the District Judge erred in affirming the order of Referee David B. Head, allowing the claim of the Collector of Internal Revenue as a valid, timely filed claim in the within bankrupt estate.

#### **II.**

That the District Judge erred in refusing to reverse the order of the Referee and in refusing to disallow the claim of the Collector of Internal Revenue as a claim in the within bankrupt estate, as the said claim was not filed within the statutory period provided therefor.

III.

That the District Judge erred in concluding that the 1938 Amendment of Section 57-n of the Bankruptcy Act does not prohibit the allowing of the claim of the said Collector of Internal Revenue.

IV.

That the District Judge erred in not concluding that Section 355 of the Bankruptcy Act was an Amendment of, or Supplement to Section 57-n of the Bankruptcy Act.

V.

That the District Judge erred in not utilizing the approved rules of statutory interpretation in construing Section 57-n and Section 355 of the Bankruptcy Act.

VI.

That the District Judge erred in concluding that the present problem was controlled by *New York v. Irving Trust Co.* (1933), 288 U. S. 329, which case was decided prior to the 1938 Amendment of the Bankruptcy Act.

VII.

That the District Judge erred in failing to conclude that the Collector of Internal Revenue of the United States of America is specifically designated as being subject to the provisions of Section 355 of the Bankruptcy Act.

## Argument, Points and Authorities.

As the foregoing specifications of error are so closely inter-related, a separate and distinct consideration will not be given to each and every one thereof.

The problem being presented on this appeal may be most simply stated as:

*Is the United States of Amercia, Its Officers, Agents and Bureaus, as a Claimant, Bound by the Express Provisions of Section 355 of the National Bankruptcy Act?*

It is the trustee's contention that the United States, its officers, agents and bureaus, as a claimant, is so bound. This contention is based upon the well considered reasons hereinafter set forth:

1. In arriving at a true and logical solution to the problem herein presented, due consideration must be given to the various rules of statutory interpretation.
2. The intent of Congress is that the United States, its officers, agents and bureaus, as a claimant, be bound by section 355 of the Bankruptcy Act.
3. The court's construing of section 355 of the Bankruptcy Act in the Marine Stevedoring case (*In re Marine Stevedoring Corp.* (C. C. A. 3d, 1948), 169 F. 2d 554), is unreasonable and brings about an illogical result not intended by Congress.
4. The principle of law propounded by the court in the *Irving Trust* Case (*New York v. Irving Trust Company*, 288 U. S. 329, 53 S. Ct. 389, 77 L. Ed. 815), is not applicable in a present construing of sections 57-n or 355 of the Bankruptcy Act.



5. A logical construing of the pertinent sections of the Bankruptcy Act, 355 and 57-n, unequivocally demonstrates that the United States, its officers, agents and bureaus as a claimant, is specifically bound by the said section 355.

I.

**In Arriving at a True and Logical Solution to the Problem Herein Presented, Due Consideration Must Be Given to the Various Rules of Statutory Interpretation.**

The problem herein, being basically one of statutory interpretation, we must apply the various rules pertaining thereto enunciated by the courts, in our construing of the various statutory provisions involved, which, we respectfully submit, will of necessity, cause this court to conclude that section 355 of the Bankruptcy Act is binding upon the United States of America, its officers, agents and bureaus.

**A. The Bankruptcy Act Is Entitled to a Liberal Construction in Favor of the Bankrupt.**

*Maynard v. Elliott*, 283 U. S. 273, 75 L. Ed. (1931) 1028, 51 S. Ct. 390;

*Spier v. Sytsma* (C. C. A. 8th Cir., 1932), 56 F. 2d 520.

**B. The Bankruptcy Act Should Receive a Practical, Reasonable Interpretation, in Order to Promote the Object of the Law.**

*Dilworth v. Boothe* (C. C. A., 5th Cir., 1934), 69 F. 2d 621;

*In re Scott* (Dist. Ct. D, Delaware, 1904), 126 Fed. 981.

**C. Absurd, Unreasonable Constructions, and Those Which Impose Mischievous Results, Should Be Avoided.**

*Buckett v. Columbia Bank*, 195 U. S. 345, 49 L. Ed. 231, 25 S. Ct. 38;

*Peck, et al., v. Jenness, et al.*, 48 U. S. 612, 12 L. Ed. 841.

**D. The Legislative Intent and History of the Act May Be Considered.**

*Holt v. Henley*, 232 U. S. 637, 58 L. Ed. 767 (1914), 34 Sup. Ct. 459;

*Southerland Statutory Construction*, 3rd Ed., Vol. II, pp. 481, *et seq.*

**E. Specific Provisions Should Not Be Treated Abstractly. Every Section, Sub-section, and Provision Should Be Construed Together in Order to Ascertain the True Legislative Intent.**

*West v. Lea Bros.*, 174 U. S. 590, 43 L. Ed. 1098 (1899), 19 S. Ct. 839.

**F. In the Construing of a Statute, Later Amendments There-to Cannot Be Ignored.**

*Summers v. Collector of Taxes* (C. C. A., 8th Cir., 1937), 92 F. 2d 819.

**G. A Change in the Phraseology of a Statute Re-enacted Creates a Presumption of a Change of Intent, of the Legislative Body, From That Expressed in the Former Statute.**

*Crawford v. Burke*, 195 U. S. 176, 49 L. Ed. 147, 25 S. Ct. 9.

The statutory provisions to which the rules hereinabove set forth are to be applied, are the following sections of the Bankruptcy Act:

“57-n. Except as otherwise provided in this Act, all claims provable under this Act, including all claims of the United States and of any State or subdivision thereof, shall be proved and filed in the manner provided in this section. Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed: Provided, however, That the court may, upon application before the expiration of such period and for cause shown, grant a reasonable fixed extension of time for the filing of claims by the United States or any State or subdivision thereof. \* \* \*.”

“Sec. 355. Upon the entry of an order under the provisions of this chapter directing that bankruptcy be proceeded with, only such claims as are provable under section 63 of this Act shall be allowed and, except as provided in section 354 of this Act, claims not already filed may be filed within three months after the first date set for the first meeting of creditors, held pursuant to section 55 of this Act, or, if such date has previously been set, then within three months after the mailing of notice to creditors of the entry of the order directing that bankruptcy be proceeded with.”

## II.

### **The Intent of Congress Is That the United States, Its Officers, Agents and Bureaus, as a Claimant, Be Bound by Section 355 of the Bankruptcy Act.**

Before a proper construction can be placed upon the various sections of the Bankruptcy Act herein involved, due regard must be had for the intent of the Legislature, including the problems to be remedied by the legislation, together with the Legislature's solution thereof.

That Congress did not intend the United States to be placed in a preferred category with respect to filing its claims following the entry of an order of adjudication in a pending Chapter XI proceeding, as it did specifically place the United States in a privileged category in section 57-n by providing that the United States, for cause shown, might petition for an extension of time in which to file its claim, and in section 64-a(4), which granted to the United States a fourth order of priority as to payment ahead of general unsecured creditors, may be concluded from an evaluation of various reports submitted by the committees in Congress that drafted the present Bankruptcy Act, enacted June 22, 1938, which substantially changed the then existing Act.

In considering these reports we must bear in mind that prior to 1938 there was no provision in section 57-n including the United States, or any of its States therein. Nor was the present Chapter XI in existence. Rather, the skeleton provisions of Chapter XI were contained in the old sections 12, "Compositions, When Confirmed," and 74, "Compositions and Extensions," wherein no specific provision was made as to the filing of claims in the proceedings in the event that an order of adjudication was entered, and bankruptcy directed to be proceeded with.

The first of these reports is cited in Collier on Bankruptcy, 14 Ed., Vol. 8, p. 1013, N. 43, Analysis of H. R. 12889, 74th Cong. 2d Sess. (1936) 180, wherein the committee reported:

“In an early draft of the Chandler Act, present Chapters X, XI, XII, and XIII were contained in Section 12. In an analysis of that draft, the following comment was made with respect to the six months’ period of Section 57-n and the three months’ period of the provisions now contained in Section 355: ‘It should be observed that the time limit of six months is retained. However, under our Section 12 this period is reduced to three months. Since the period is now to run from the date of the first meeting, it is our thought that in the interest of expedition, a three months’ limitation might apply as well to a proceedings in bankruptcy; but we are deferring to a majority opinion, which prefers the longer period in the ordinary bankruptcy case. *In the case, however, of a proceeding initiated under our Section 12, where creditors have already had notice of the pending proceedings, it would seem that a shorter period is adequate.’*” (Emphasis ours.)

In 1937 the House of Representatives submitted its final report, H. R. 1409, 75th Cong., 1st Sess., wherein it set forth, at page 3, as two of the purposes of the Bill then under consideration:

“\* \* \* 2—To increase efficiency in administration \* \* \*. 10—To prescribe an improved composition procedure, including certain of the relief provisions of the Act for individual compositions and extensions, and a carefully prepared plan of corporate reorganizations, retaining the desirable permanent provisions of the new legislation and eliminating cumbersome, overlapping, and inconsistent provisions \* \* \*.”



Thereafter, at page 13 of the aforesaid report, under the general heading "Amendments to Increase Efficiency in Administration" the committee gave specific consideration to the provisions regulating the time in which claims must be filed:

"(3) CLAIMS—FILING—Section 57: Subdivision n relating to the filing of claims has been entirely recast, and several significant changes have been made.

*All proofs of claim, except as otherwise provided in Chapters X, XI, XII and XIII, including claims for taxes and debts owing to a government, must be filed and proved.* (Emphasis ours.) The provision in respect to government claims is added in order to overcome the decisions which hold that the bar time for the filing of claims is not binding upon the sovereign. Thus, the administration of the estate is speeded up, and the distribution becomes more certain and definite. \* \* \*

The time for filing claims is made to relate to the date of the first meeting of creditors, instead of the date of adjudication. Creditors do not customarily receive notice of the proceedings until the first meeting is fixed. In many cases schedules are not filed for several months, thereby delaying the first meeting of creditors. Therefore, it is proper for the protection of creditors that the time for filing claims shall run from the date of the first meeting.

*The provisions in Chapters X, XI, XII, and XIII with reference to the filing of claims should be considered in this connection."* (Emphasis ours.)

The Senate Committee, in 1938, made its report, Sen. Reports 1916, 75th Cong., 3d Sess., Calendar No. 2022, and did therein, at page 2, under the general heading "Necessity for Amendment of Act," make the following statement:

“\* \* \* The provisions dealing with claims of Federal and State Governments, particularly with respect to the proving and filing of such claims and the dischargeability of tax claims, require modernization.

Numerous procedural provisions, particularly those relating to time periods, need alteration in order to expedite the proceedings. \* \* \*

The present law fails to deal adequately with compensation of referees, receivers, and trustees, the filing and proving of claims \* \* \*.”

Thereafter, at page 5 of the said report, the committee considers the new provisions relative to the filing of claims:

“5. INCLUDING GOVERNMENT CLAIMS WITHIN THE BAR TIME—EXTENSION OF TIME—(Sec. 57, subdivision n, p. 76, lines 7 and 10-13).

The House bill includes within the bar time for the proving of claims, all claims of the United States and of any State or subdivision thereof. The committee has both strengthened and extended this proposed amendment by providing first, that such claims must actually be filed within the bar time, and second, by permitting additional time for the filing of such claims upon application for cause shown. *The committee agrees with the proposal that government claims should be subjected to the same requirements as other claims* (Emphasis ours), but is of the opinion that the limitation should be tempered by the provision for extension, for the reason that it is sometimes difficult for the Government to prepare and present its claim within a fixed time. The limitation will speed up the closing of estates, and the extension will provide a reasonable flexibility.”

Having carefully analyzed these various reports and bearing in mind the reasons heretofore enumerated for the

amendment to section 57-n, so as to include the United States and the various States within its time provision, and further, considering that the entire of Chapter XI was added to the Act simultaneously therewith, it would seem logical to conclude that the Congress actually intended the United States to be bound by the time limit prescribed in section 355 of the Bankruptcy Act.

In Collier on Bankruptcy, 14th Ed. (1940), Vol. 8, P. 1017, it is stated:

“Congress definitely intended that the three month period of section 355 entirely replace the six months’ period of section 57-n; there is no indication of an intent to preserve the six month period of section 57-n for any purpose.”

A realization, that Congress intended that the United States be considered on an equal basis with other creditors in bankruptcy proceedings unless expressly excepted, was had by the Supreme Court of the United States in the case of *City of New York v. Saper*, 336 U. S. 328, 93 L. Ed. 710, 69 S. Ct. 554. Therein the court determined that unsecured tax claims of the United States would bear interest only to the date of bankruptcy, not to the date of payment. The court also decided this issue even though the United States is not specifically mentioned in section 63-a (1) and (5) of the Act, which limits interest collectible to the date of bankruptcy. It was pointed out that there was no provision in the Bankruptcy Act expressly repudiating this principle or allowing an exception in favor of tax claims. The court in the *Saper* case concluded by stating:

“Tax claims are treated the same as other debts, except for the fourth priority of payment.”

III.

**The Court's Construing of Section 355 of the Bankruptcy Act in the Marine Stevedoring Case [In re Marine Stevedoring Corp. (C. C. A. 3d, 1948), 169 F. 2d 554], Is Unreasonable and Brings About an Illogical Result Not Intended by Congress.**

Two reported cases have been decided which have attempted to answer the problem herein presented. However, in neither of the said cases does it appear that the court actually construed and interpreted the statutory provisions actually involved.

The first of these cases is *In re Dorb the Chemist Pharmacies, Inc.* (S. D. N. Y., 1939), 43 Am. B. R. (N. S.) 688, 29 Fed. Supp. 832, wherein District Judge Goddard decided that section 355 of the Act did not bind the United States because section 378(2) of the said Act indicated an intent to the contrary on the part of Congress, by providing therein that after the entry of an Order of Adjudication in a pending Chapter XI proceeding, "the proceeding shall be conducted, so far as possible, in the same manner and with like effect as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered on the day when the petition under this chapter was filed."

The court need not have strayed so far from the section involved to find such a statement as that in section 378(2), as in section 355 itself, it provides for the allowance of only those claims provable under section 63 of the Act and for a first meeting of creditors as provided in section 55 in the said Act. Further, section 302 of the Act, which



deals with the construction of the provisions in Chapter XI, provides:

“The provisions of Chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent with or in conflict with the provisions of this Chapter, apply in proceedings under this Chapter.”

However, it is to be noted, that the court makes no attempt to harmoniously construe the two pertinent sections herein involved, namely, 57-n and 355. As these two sections are the only ones pertaining to the filing of claims in the factual situation presented, it would appear mandatory that such a construing be considered.

Further, the decision in the *Dorb* case is pure dictum, as an analysis of the pertinent facts will demonstrate. The original petition under Chapter XI was filed on January 4, 1939. Thereafter, on the 26th of January, 1939, an order was entered adjudicating the debtor a bankrupt and directing liquidation. On January 27, 1939, the claimant, City of New York, received a notice stating that all claims must be filed within three months after the date of the said notice, to wit, January 27, 1939, and that the first meeting of creditors would be held on February 6, 1939. On May 3, 1939, the Referee denied an application made by the claimant to file its claim on the ground that the date in which to file claims had expired on the 27th of April, 1939, which was, in effect, three months after the date previously set for the filing of claims. However, it is to be noted that the three-month period after the first date



set for the first meeting of creditors did not expire until the 6th day of May, 1939, three days after the order of the Referee denying the city's application to file a claim, which order was later reversed by Judge Goddard.

As the *Dorb* case deals with an original Chapter XI proceeding filed under the provisions of section 322 of the Bankruptcy Act, there could not have been any other first date set for the first meeting of creditors held pursuant to section 55 of this Act, other than that set by the court in its notice of January 27, 1939, namely, February 6, 1939. The three-month period under section 355 in which to file claims based upon this date, had not expired when the Referee made his order disallowing the said claim.

The second case considering our problem is *In re Marine Stevedoring Corp.* (C. C. A. 3d, 1948), 169 F. 2d 554. Judge Biges, in speaking for the court, bases its opinion entirely on the *Dorb* case in its holding that the United States is not bound by section 355 of the Bankruptcy Act.

Here, again, the facts did not warrant the court even considering the time limit of section 355 or, for that matter, of section 57-n, as this too, was an original Chapter XI proceeding filed under the provisions of section 322 of the Bankruptcy Act, in which no date was ever fixed for a first meeting of creditors. The original proceedings being filed on the 26th of October, 1943, and no arrangement having been effected, on the 17th of May, 1944, the Referee caused a notice to be mailed to the creditors to the effect that on the 12th of May, 1944, an order had been entered adjudging the debtor a bankrupt and directing that all

claims be filed within three months of the date of the said order.

As no first meeting of creditors had been previously set, and since it is mandatory under the provisions of section 355 of the Bankruptcy Act that such a meeting be set, and, that the period within which claims are to be filed is to be based upon that date by virtue of the express provisions of section 355 (*Matter of Credit Service, Inc.* (D. Md., 1941), 49 Am. B. R. (N. S.), 796, 38 Fed. Supp. 761), there was no apparent need for this decision, nor for that in the *Dorb* case. The United States, an individual State, a prior labor claimant or even a general unsecured creditor might have still filed a claim, as it was impossible, under the circumstances, for any period relative to the filing of claims to have commenced, let alone to have expired.

However, apart from the reasoning of the court in the aforesaid cases, and apart from the question as to whether or not the decisions were necessary, let us now extend these decisions to their logical conclusions.

Certainly, Congress could not have intended the strange results that appear in the factual situation propounded in Collier on Bankruptcy, 14th Ed., Vol. 8, page 1018:

“If a section 321 petition is filed in a pending bankruptcy proceeding five months after the first date set for the first meeting of creditors, and two months later an order is entered under Chapter XI directing that bankruptcy be proceeded with, creditors in general thereafter have the three months’ period prescribed by section 355 within which to file their

claims, if not already filed. But if section 57-n determines the time within which the claims of the United States or any state or subdivision thereof may be filed, then the claims of the United States or any state or subdivision thereof which have not already been filed are entirely barred from being filed, since more than six months have expired since the first date set for the first meeting of creditors, unless it be held in that situation that the government may take advantage of the provisions of section 355. Clearly, Congress did not intend a rule that in some cases would treat the United States and the states and subdivisions thereof less favorably than ordinary creditors are treated. It is thus apparent that the six months' period prescribed by section 57-n is not applicable, and that the three months' period prescribed by section 355 does not act as a bar because it fails specifically to include the United States or any state or subdivision thereof. Since there is no fixed time limiting those claims, the proviso of section 57-n dealing with an extension of time can have no application, although that proviso would be applicable if either the six months' period of section 57-n or the three months' period of section 355 applied. Claims may be filed by the United States or any state or subdivision thereof after the expiration of the three months' period prescribed by section 355, without the necessity for an order of extension. That is subject, however, to the power of the court to issue a bar order requiring the United States or any state or subdivision thereof to file its claim within a certain period or be barred from participating in

the estate. *Unless and until it be judicially determined that either section 355 or section 57-n does apply to claims of the United States or any state or subdivision thereof, it is the safer practice for a trustee to apply for the entry of such a bar order.*" (Emphasis ours.)

Such a conclusion obviously discriminatory against the United States, would seem to be just as unwarranted as a complete exclusion of all tax claims in a situation covered by Section 355, merely because tax claims are not enumerated in Section 63 of the Bankruptcy Act. Such a conclusion would result from an isolated consideration of the opening phrase of Section 355 which states:

"Upon the entry of an order under the provisions of this Chapter directing that bankruptcy be proceeded with, only such claims as are provable under Section 63 of this Act are to be allowed. \* \* \*"

Clearly, conclusions such as these, which logically follow the decision in *In re Marine Stevedoring Corp.* lead to unreasonable, illogical, and mischievous results which, of necessity, place the United States, its officers, agents and bureaus in a position less favorable than that of other creditors, a situation obviously not intended by the Congress of the United States. Certainly, such constructions and interpretations should be ignored if a reasonable construction and interpretation is possible.



IV.

**The Principle of Law Propounded by the Court in the Irving Trust Company Case (New York v. Irving Trust Company, 288 U. S. 329, 53 S. Ct. 389, 77 L. Ed. 815) Is Not Now Applicable in a Present Construing of Section 57-n or Section 355 of the Bankruptcy Act.**

It is granted that if a statutory provision tends to injuriously encroach upon affairs of the government it will receive a strict interpretation in favor of the public, and in the absence of an express provision or a necessary implication, the sovereign remains unaffected. (*United States v. Herron*, 87 U. S. 251, 22 L. Ed. 275.) This is the rule adhered to by the court in *New York v. Irving Trust Company*, 288 U. S. 329, 53 S. Ct. 389, 77 L. Ed. 815, wherein it was provided that since the United States was not specifically mentioned in the old Section 57-n of the Act that it was not bound by its provisions.

However, this rule, too, is subject to modification, as where the government is expressly included, there then being no room for application of the rule (*Inhabitants of Whiting v. Inhabitants of Lubec*, 121 Me. 121, 115 Atl. 896), or, where such a modification is necessary to enable the statute to receive a sensible and reasonable treatment. Such a modification of the rule is required where the demands of a contrary public policy include the government within the purpose and intendment of the statute. This may be reflected where the objective of the statute could not be accomplished, without including the govern-



ment within its provisions. (*Fink v. O'Neil*, 106 U. S. 272, 27 L. Ed. 196, 1 S. Ct. 325; *Guarantee Co. v. Title Guaranty Co.*, 224 U. S. 152, 56 L. Ed. 706, 32 S. Ct. 457.)

Such a modification of this rule is required in the problem herein presented, as the intent of Congress is to expedite and increase efficiency in the administration of bankrupt estates and to this end did specifically include the United States within the provision of Section 57-n and did simultaneously therewith enact the entirety of Chapter XI of the Bankruptcy Act, together with Section 355 therein, with the intent, as hereinbefore enunciated in the various committee reports, that the provisions of Chapter XI, with reference to the filing of claims, be considered under the legislative intent that occasioned the amendment of Section 57-n.

This very court adhered to a like principle in *In re Knox-Powell-Stockton Co.* (1939), 100 F. 2d 997, wherein it determined that the United States was bound by the provisions of the old Section 67-d of the Bankruptcy Act, though not specifically mentioned therein, and as a result, that a State tax lien claim was to be paid ahead of an unsecured income tax claim of the United States, and the court did therein state, at page 982:

“\* \* \* And section 67-d applied against the United States as against any other creditor, since the Act was passed with the United States in the mind of Congress.”

V.

**A Logical Construing of the Pertinent Sections of the Bankruptcy Act, 355 and 57-n, Unequivocally Demonstrates That the United States, Its Officers, Agents and Bureaus as a Claimant Is Specifically Bound by the Said Section 355.**

It is respectfully submitted that in attempting to arrive at a logical solution of the problem herein presented, bearing in mind various rules of statutory interpretation hereinbefore considered, we must now construe the various sections and sub-sections of the Bankruptcy Act pertinent to our problem, with particular emphasis being placed upon Section 57-n and 355 thereof.

Section 57-n provides:

“Except as otherwise provided in this Act, all claims provable under this Act, including all claims of the United States and of any State or subdivision thereof, shall be proved and filed in the manner provided in this section. Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed.”

This section then, by its very terms, “Except as otherwise provided in this Act, *all claims* provable under this Act” (Emphasis ours), specifically proclaims that its provisions are the general rule and must be so considered by all, even by the United States, its officers, agents and bureaus, unless there are specific exceptions made thereto. No attempt is made to indicate an intent on the part of Congress that the provisions of this section are applicable

merely to ordinary bankruptcy proceedings, to the exclusion of "chapter" proceedings, Chapters X, XI, XII and XIII being a part of the Bankruptcy Act. It specifically includes "all claims provable under this Act," not all claims provable in proceedings covered by Chapters I to VII of this Act.

The other section of primary importance relative to the filing of claims, enacted simultaneously with the amendment to Section 57-n, is Section 355, which provides:

"Upon the entry of an order under the provisions of this chapter directing that bankruptcy be proceeded with, only such claims as are provable under section 63 of this Act shall be allowed and, except as provided in section 354 of this Act, claims not already filed may be filed within three months after the first date set for the first meeting of creditors, held pursuant to section 55 of this Act, or, if such date has previously been set, then within three months after the mailing of notice to creditors of the entry of the order directing that bankruptcy be proceeded with."

By the very provisions of this latter section, we see that Congress in no way intended that this section be isolated from the various other sections and sub-sections of the Act as reference therein is made to Section 63 which enumerates debts which may be proved, and Section 55 which relates to meetings of creditors.

In construing these two important sections, we should consider the case of *Broughton v. Humble Oil Co.*, 105

S. W. 2d 480, wherein the court determined that the existence of an exception in the statute clarified the intent that the statute should apply in all cases not excepted. In applying this thought to our construing the sections under surveillance it would seem that a reasonable reading together of the two sections would be that EXCEPT IN THE SITUATION COVERED BY SECTION 355 WHEREIN A THREE-MONTH PERIOD WILL PREVAIL, ALL CLAIMS PROVABLE UNDER THIS ACT, INCLUDING THOSE OF THE UNITED STATES AND ANY STATE OR SUBDIVISION THEREOF, SHALL BE PROVED AND FILED IN THE MANNER PROVIDED IN THIS SECTION, TO-WIT, CLAIMS NOT FILED WITHIN SIX MONTHS AFTER THE FIRST DATE SET FOR THE FIRST MEETING OF CREDITORS SHALL NOT BE ALLOWED.

In so construing these two sections, it can be readily seen that the United States is specifically mentioned and must, of necessity, be bound by the three-month period prescribed by Section 355 of the Act.

Nowhere in Section 355 does Congress alter its general mandatory provisions found in Section 57-n binding the United States as well as other persons. Nor, is there any attempt by Congress in Section 355, to place the United States in a privileged category or in a category less advantageous than that occupied by other creditors. In short, Section 355 merely shortens the six-month period generally provided for by Section 57-n, to a period of three months.

### Conclusion.

It is respectfully submitted that a harmonious construction and interpretation, such as we have heretofore suggested, gives a sensible and reasonable treatment to the pertinent sections of the Act herein involved, and provides for the solving of the problem in existence when the said sections were amended and enacted, by giving full effect to the obvious and proclaimed intent of Congress.

We respectfully submit that the decision of the District Court be reversed and that the claim of the Collector of Internal Revenue in and for the Sixth Collection District of California be disallowed.

CRAIG, WELLER & LAUGHARN,  
HUBERT F. LAUGHARN,  
THOMAS S. TOBIN,  
A. J. BUMB,

*Attorneys for Appellant.*



No. 13077

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate  
of Radiophone Corporation, Bankrupt,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

On Appeal From the United States District Court for the  
Southern District of California.

---

## BRIEF FOR THE UNITED STATES.

---

ELLIS N. SLACK,

*Acting Assistant Attorney General.*

ROBERT N. ANDERSON,

S. DEE HANSON,

*Special Assistants to the Attorney  
General.*

Department of Justice Building,  
Washington 25, D. C.,

WALTER S. BINNS,

*United States Attorney.*

E. H. MITCHELL,

EDWARD R. McHALE,

*Assistant United States Attorneys.*

312 North Spring Street,  
Los Angeles 12, California,

**FILED**

**DEC 22 1951**

**PAUL P. O'BRIEN**  
**CLERK**



## TOPICAL INDEX

	PAGE
Opinions below .....	1
Jurisdiction .....	2
Question presented .....	4
Statutes involved .....	4
Statement .....	5
Summary of argument.....	6
Argument .....	8
The District Court correctly held that Section 57n of the Bankruptcy Act, as amended, allowing six months for filing claims, and not Section 355 of that Act allowing three months therefor, governs claims of the United States filed in Bankruptcy Proceedings.....	8
Conclusion .....	19
Appendix: Pertinent provisions of the Bankruptcy Act, as amended, the Revised Statutes and the Internal Revenue Code .....	App. p. 1

# TABLE OF AUTHORITIES CITED.

CASES	PAGE
Brezin, In re, 297 Fed. 300.....	11
Brown, W. P., & Sons Lumber Co. v. Commissioner, 38 F. 2d 425; affd., 282 U. S. 283.....	14
Caminetti v. United States, 242 U. S. 470.....	13
Carbon Steel Co. v. Lewellyn, 251 U. S. 501.....	14
Chandler Motors of New England, In re, 17 F. 2d 998.....	11
Dorb The Chemist Pharmacies, In re, 29 Fed. Supp. 832..... .....	12, 13, 15, 18
Dupont de Nemours & Co. v. Davis, 264 U. S. 456.....	14
Ervin Service Corp., In re, 33 Fed. Supp. 653.....	12, 15, 18
Hamilton v. Rathbone, 175 U. S. 414.....	13
Hellmich v. Hellman, 276 U. S. 233.....	13
Knox-Powell-Stockton Co., In re, 100 F. 2d 979.....	19
Magruder v. Safe Deposit & Trust Co. of Baltimore, 121 F. 2d 981 .....	14
Marine Stevedoring Corp., In re, 169 F. 2d 554....	12, 13, 14, 16, 18
Matisoff, In re, 36 Fed. Supp. 896.....	12, 15, 18
Menist, J., Co., In re, 294 Fed. 532.....	11
New York v. Irving Trust Co., 288 U. S. 329..... .....	8, 10, 11, 12, 14, 15
New York v. Saper, 336 U. S. 328.....	19
Parrott v. McLaughlin, 67 F. 2d 397.....	14
Roschen v. Ward, 279 U. S. 337.....	14
South Carolina Produce Ass'n v. Commissioner, 50 F. 2d 742 .....	13, 14
State of Delaware v. Irving Trust Co., 92 F. 2d 17.....	11
United States v. East, 80 F. 2d 134.....	13

	PAGE
United States v. Katz, 271 U. S. 354.....	14
United States v. Whited & Wheless, 246 U. S. 552.....	14
Villere v. United States, 18 F. 2d 409; cert. den., 275 U. S. 532 .....	11
White v. United States, 305 U. S. 281.....	14
Worth Bros. Co. v. Lederer, 251 U. S. 507.....	14

### STATUTES

#### Bankruptcy Act, Chap. 541, 30 Stat. 544:

Sec. 55 (11 U.S.C. 1946 ed., Sec. 91) .....	8, 9
Sec. 57 (11 U.S.C. 1946 ed., Sec. 93).....	10
Sec. 64 (11 U.S.C. 1946 ed., Sec. 104).....	4
Sec. 355 (11 U.S.C. 1946 ed., Sec. 755).....	
.....	3, 4, 6, 7, 9, 10, 11, 12, 13, 15, 16, 18
Sec. 376 (11 U.S.C. 1946 ed., Sec. 776).....	4
Sec. 377 (11 U.S.C. 1946 ed., Sec. 777).....	4
Sec. 378 (11 U.S.C. 1946 ed., Sec. 778).....	4
Sec. 659 (11 U.S.C. 1946 ed., Sec. 1059).....	4

Internal Revenue Code, Sec. 3661 (26 U.S.C. 1946 ed., Sec. 3661) .....	12
---	----

#### Revised Statutes:

Sec. 3466 (31 U.S.C. 1946 ed., Sec. 191).....	12
Sec. 3467 (31 U.S.C. 1946 ed., Sec. 192).....	12

### MISCELLANEOUS

I. T. 1746, II-2 Cum. Bull. 235 (1923).....	11
I. T. 1947, III-1 Cum. Bull. 332 (1924).....	11





No. 13077

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate  
of Radiophone Corporation, Bankrupt,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

## BRIEF FOR THE UNITED STATES.

---

### Opinions Below.

The only opinion rendered by the District Court is contained in its unreported order on review of the second order of the Referee in Bankruptcy [R. 25-27] allowing the Collector's claim and setting aside his previous order [R. 21-22] disallowing such claim [R. 33-34]. The only opinion rendered by the Referee in Bankruptcy is contained in his certificate on review to the District Court on the trustee's petition [R. 27-33] to review his second order allowing the Collector's claim [R. 17-18], which is likewise unreported.

### Jurisdiction.

This proceeding arose in the District Court for the Southern District of California upon petition for an arrangement under the provisions of Chapter XI of the Bankruptcy Act, as amended, by the Radiophone Corporation, a California corporation, with its principal place of business in Los Angeles, California, which was filed on August 5, 1947. [R. 3-12.] The order approving the petition as one for relief under Section 322 of the Bankruptcy Act, as amended, and referring the matter to Hubert F. Laugharn, one of the Referees in Bankruptcy, to take such further proceedings as were required by the provisions of the Bankruptcy Act, was entered on the same date. [R. 12-13.] The jurisdiction of the District Court was conferred by Section 2 of the Bankruptcy Act, as amended, and Section 24, Nineteenth, of the Judicial Code. Under date of November 8, 1947, the Referee in Bankruptcy, in the absence of the debtor corporation's presenting a fair or feasible plan of arrangement, and in compliance with the request of the unsecured creditors that an order of adjudication be entered herein, with no one objecting thereto, entered an order under the provisions of Section 377(2) of Chapter XI of the Bankruptcy Act, as amended, adjudicating the debtor, the Radiophone Corporation, a bankrupt. [R. 14, 26.] Under date of March 10, 1950, the successor Referee in Bankruptcy, David B. Head, to whom this matter had been later referred<sup>1</sup> [R. 17], entered an order disallowing the Collector's claim for deficiencies in federal income, excess profits and additional federal unemployment taxes in the

---

<sup>1</sup>While this matter was initially referred to Referee in Bankruptcy Hubert F. Laugharn [R. 13], it was subsequently referred to Referee David B. Head. [R. 17.]

aggregate sum of \$15,196.35 for the year 1945, the taxable period January 1, to July 3, 1946 (and part of 1947 for additional unemployment tax), with interest according to law [R. 19-21], as untimely filed after the expiration of the three months' statutory period provided therefor by Section 355 of the Bankruptcy Act, as amended, but made allowance therefor, under the six months' limitation period provided by Section 57n of that Act, to the extent of any surplus remaining after the payment of the claims already filed and allowed within the three months' statutory period under Section 355. [R. 21-22.] On May 10, 1950, however, the successor Referee in Bankruptcy, pursuant to hearing had on the Collector's motion for reconsideration of his previous order of March 10, 1950, disallowing the Collector's claim, filed together with notice thereof on March 14, 1950 [R. 22-24], entered the second order (including his findings of fact and conclusions of law), setting aside his previous adverse order and allowing the Collector's claim in full, as having been timely filed within the six months' period provided by Section 57n of the Bankruptcy Act, as amended.<sup>2</sup> [R. 25-27.] Thereafter the petition for review of the Referee's second order of May

---

<sup>2</sup>While the trustee-appellant states that the Referee entered this second order "on May 15, 1950" (Br. 4), and the record, apparently through inadvertence, misprint or otherwise, indicates that it was "Dated" on that date [R. 27], the correct date on which it was entered appears to be, as indicated at the end of the document, "Filed May 10, 1950; Referee" [R. 27], as verified in the Referee's Certificate on Review—"4. Findings, Conclusions and Order of May 10, 1950." [R. 18.]

10, 1950, was duly filed by the trustee-appellant on May 23, 1950. [R. 27-33.] Thereupon, the District Court, upon a hearing had on the petition for review, made the order on review confirming the Referee's second order of May 10, 1950, allowing the Collector's claim, which order of the District Court was entered on June 19, 1951. [R. 33-34.] Notice of appeal from this order of the District Court was duly filed by the trustee-appellant on July 17, 1951, pursuant to Section 25a of the Bankruptcy Act, as amended. [R. 34-35.] The jurisdiction of this Court to hear and determine this appeal is conferred by Section 24a of the Bankruptcy Act, as amended, and 28 U. S. C., Section 1291.

### **Question Presented.**

Whether the six months' limitation period for filing claims in bankruptcy proceedings as provided by Section 57n of the Bankruptcy Act, as amended, which specifically embraces "all claims of the United States," or the three months' period for filing claims generally as provided in Section 355 of that Act which makes no mention of claims of the United States, applies to the Collector's claim for federal taxes asserted against the bankrupt taxpayer.

### **Statutes Involved.**

The pertinent provisions of the Bankruptcy Act, as amended, the Revised Statutes and the Internal Revenue Code are printed in the Appendix, *infra*.



### Statement.

This is an appeal by the trustee-appellant [R. 34-35] from the order of the District Court [R. 33-34], confirming the second and final order of the Referee in Bankruptcy entered on May 10, 1950, in favor of the Collector. [R. 25-27.] The Referee had initially disallowed the Collector's claim for deficiencies in federal income, excess profits, and unemployment taxes asserted against the bankrupt taxpayer in the total sum of \$15,196.35 for the year 1945, the taxable period January 1 to July 3, 1946, and additional unemployment tax (\$18.58) for 1947, together with interest according to law [R. 19-21], on the ground that it was not timely filed within the three months' statutory period allowed therefor by Section 355 of the Bankruptcy Act, as amended. [R. 21-22.] The Referee, however, upon reconsideration of the matter pursuant to the Collector's motion representing, with supporting authorities, that the United States is not bound by the three months' limitation period on filing claims under Section 355 inasmuch as it is not mentioned specifically in that section, [R. 23-24], entered his second order on May 10, 1950, setting aside and reversing his previous order disallowing the Collector's claim [R. 25-27], and upon so doing, made the following findings of fact upholding the Collector's claim. [R. 25-26.]

Radiophone Corporation filed a petition under Section 322 of the Bankruptcy Act on August 5, 1947. [R. 25.]

An order adjudicating Radiophone Corporation a bankrupt was entered November 8, 1947.<sup>3</sup> The first date set

---

<sup>3</sup>This date was erroneously printed as "November 88, 1947," in the record upon appeal [R. 26], but should correctly read November 8, 1947. [R. 14.]

for the first meeting of creditors after the adjudication was November 26, 1947. [R. 26.]

The claim of the Collector was filed on March 1, 1948, for the sum of \$15,196.35, which date of filing was more than three months after the first date set for the first meeting of creditors after the adjudication, but less than six months after the first date set for the first meeting of creditors. [R. 26.]

Upon these facts, the Referee concluded as a matter of law [R. 26] and held [R. 18], upon the authorities submitted by the Collector [R. 24], that the six months' provision for filing claims as provided by Section 57n of the Bankruptcy Act, as amended, and not the three months' period provided therefor in Section 355 of that Act, applies to claims of the United States, and thereupon entered his order allowing the Collector's claim accordingly. [R. 26-27.] From the order so entered, the trustee-appellant petitioned the District Court for review [R. 27-33], and upon the District Court's entering an order confirming the Referee's second order allowing the claim [R. 33-34], the trustee appealed to this Court for review. [R. 34-35.]

### **Summary of Argument.**

The District Court affirmed the final order of the Referee in Bankruptcy holding that the six months' limitation period provided in Section 57n of the Bankruptcy Act, as amended, and not the three months' period provided in Section 355 of that Act, for filing claims after the first date set for the first meeting of creditors in bankruptcy proceedings, applies to claims of the Government, and therefore the Collector's claim here was timely filed within the six months' period. This is correct for the 1938

amendment to the Bankruptcy Act expressly includes such claims of the Government in the provisions of Section 57n, and bars them if not filed within six months after the first date for the first meeting of creditors, whereas Section 355 fails to make any mention whatever of claims of the Government. Under these circumstances, Section 355, contrary to the appellant's contentions (Br. 23-25), does not constitute an exception "as otherwise provided in this Act" to the provisions of Section 57n which, as pointed out above, specifically mentions and embraces "all claims of the United States." It is clear, therefore, that Congress, upon enacting the 1938 amendment to the Bankruptcy Act, expressly intended the six months' bar in Section 57n to cover claims of the United States. Equally as clearly, if Congress had intended to make the three months' bar in Section 355 apply to such claims, it would have undoubtedly included them in the latter section instead of in the former. Any other construction of the pertinent terms of the statute would reduce them to empty declarations and render them meaningless, whereas a sensible and reasonable construction, as required by the authorities—if indeed any is needed in view of the unambiguity of the applicable statute—clearly shows that the amendatory provisions of Section 57n are directly applicable to claims of the United States, such as that involved here.

## ARGUMENT.

**The District Court Correctly Held That Section 57n of the Bankruptcy Act, as Amended, Allowing Six Months for Filing Claims, and Not Section 355 of That Act Allowing Three Months Therefor, Governs Claims of the United States Filed in Bankruptcy Proceedings.**

The sole question presented for decision is whether the six months' limitation period for filing claims in bankruptcy proceedings, as provided by Section 57n of the Bankruptcy Act as amended (Appendix, *Infra*), which specifically embraces "all claims of the United States," or the three months' period for filing claims generally, as provided in Section 355 of that Act (Appendix, *infra*), which makes no mention of claims of the United States, is applicable to the Collector's claim for taxes asserted against the bankrupt taxpayer here. The claim in question was filed more than three months but less than six months after the first date set by the Referee in Bankruptcy (hereinafter called the Referee) for the first meeting of the creditors after the order of adjudication of the bankrupt [R. 26], pursuant to Section 55 of that Act. Therefore, if Section 57n governs, as we contend, the claim was timely filed and properly allowed, whereas if Section 355 is controlling, as the trustee-appellant contends, it was untimely and consequently not allowable.

The District Court, sustaining the Referee's conclusion [R. 18, 26], held on the authority of *New York v. Irving Trust Co.*, 288 U. S. 329, 331, that Section 355 does not govern claims filed by the United States but that Section 57n thereof allowing six months for filing such claims is controlling in respect of the Collector's claim here. [R. 33-34.] The trustee contends that the court below erred



in so holding on the ground that upon a proper interpretation of the statute involved, Congress allegedly intended that the United States and its officers and agencies, as claimants, should be bound by the three months' period provided in Section 355 (Br. 7-14) instead of the six months' limitation in Section 57n. (Br. 23-25.) The argument is that the authorities relied on by the Referee [R. 18, 24] unreasonably construe Section 355 and thus bring about an illogical result not intended by Congress (Br. 15-20); and that the authority relied on by the District Court is not applicable in the construction of Sections 57n and 355 because that case was decided prior to the 1938 amendment to the Bankruptcy Act. (Br. 21-22.) We submit that there is no support in the record for these contentions, and that the District Court's decision is clearly correct.

There is no dispute as to the facts. [R. 17; App. Br. 3-4.] They show that the taxpayer was adjudicated a bankrupt on November 8, 1947 [R. 14, 26]; the first date set by the Referee for the first meeting of creditors after such adjudication pursuant to Section 55 was November 26, 1947 [R. 26]; and that the Collector's claim for federal taxes and accrued interest in the aggregate sum of the \$15,196.35 was filed on March 1, 1948 [R. 19-21], which was more than three months but less than six months after the first date set for the first meeting of the creditors, pursuant to the provisions of Section 55. [R. 26.]

The pertinent provisions of Section 57n of the Bankruptcy Act, as amended, effective September 22, 1938, upon which we rely, specify that—

Except as otherwise provided in this Act, all claims provable under this Act, *including all claims of the*



*United States \* \* \** shall be proved and filed in the manner provided in this section. *Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed: Provided, however,* That the court may, upon application before the expiration of such period and for cause shown, grant a reasonable fixed extension of time for the filing of claims by the United States \* \* \* ; \* \* \*. (Italics supplied.)

The pertinent provisions of Section 355 of that Act, upon which the appellant relies, however, read as follows:

Upon the entry of an order under the provisions of this chapter directing that bankruptcy be proceeded with, only such claims as are provable under section 63 of this Act shall be allowed and, except as provided in section 354 of this Act, claims not already filed may be filed within three months after the first date set for the first meeting of creditors, held pursuant to section 55 of this Act, or, if such date has previously been set, then within three months after the mailing of notice to creditors of the entry of the order directing that bankruptcy be proceeded with.

Thus it will be noted that the new Section 57n, as amended in 1938, mentions and embraces "all claims of the United States" and "the filing of claims by the United States," whereas Section 355 makes no mention whatever of such claims. It is clear, therefore, that just as the Supreme Court held that "as the United States \* \* \* are not mentioned in the limitation of [the old] Sec. 57 [before the 1938 amendment thereto], they are not bound thereby" (*New York v. Irving Trust Co.*, 288 U. S. 329, 331), so, by a parity of reasoning, the United States can-

not now be bound by Section 355 because it is not mentioned in the three months' limitation of that section, but is plainly bound by the six months' limitation of Section 57n, as amended, because specifically mentioned therein.<sup>4</sup> Under these circumstances, Section 355, contrary to the appellant's contentions (Br. 23-25), does not constitute an exception "as otherwise provided in this Act" to the provisions of Section 57n which, as pointed out above, specifically mentions and embraces "all claims of the United States." Moreover, the affirmative of the negatively-stated provision in Section 57n, that claims of the United States which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed, is necessarily true; hence, it follows that all such claims, as the one herein, which *are* filed within six months after the first date set for the first meeting of creditors, are allowable. Further showing that Section 57n alone, exclusive of Section 355, governs all claims of the United States is the specific provision therein that while such claims must be filed within the six months' period specified therein in order to be allowable, nevertheless the court may, upon timely application and cause

---

<sup>4</sup>Before the 1938 amendment to the Bankruptcy Act, Section 57n had no application to the United States, and therefore it operated in no way as a bar to the collection of federal taxes. I. T. 1746, II-2 Cum. Bull. 235 (1923); I. T. 1947, III-1 Cum. Bull. 332 (1924); *New York v. Irving Trust Co.*, 288 U. S. 329, 331; *State of Delaware v. Irving Trust Co.*, 92 F. 2d 17, 19 (C. A. 2d); *Villere v. United States*, 18 F. 2d 409 (C. A. 5th), certiorari denied, 275 U. S. 532; *In re Chandler Motors of New England*, 17 F. 2d 998 (Mass.); *In re Brezin*, 297 Fed. 300 (N. J.); *In re J. Menist Co.*, 294 Fed. 532 (C. A. 2d). Hence, we can conceive of nothing more clearly showing the direct applicability of Section 57n, as amended, to the United States in view of the specific inclusion of claims of the United States therein, not so included before the 1938 amendment.

shown before the expiration of such period, grant a reasonable fixed extension of time for the *filing of claims by the United States*. In these circumstances, it is clear that, contrary to the appellant's contentions, the United States plainly cannot be bound by the three months' limitation in Section 355 which is completely silent in respect of claims of the United States, but only by Section 57n specifically including such claims. This the District Court properly held. [R. 33-34.] (*New York v. Irving Trust Co.*, 288 U. S. 329, 331; *In re Marine Stevedoring Corp.*, 169 F. 2d 554, 555-556 (C. A. 3d); *In re Dorb The Chemist Pharmacies*, 29 Fed. Supp. 832, 833-834 (S. D. N. Y.); *In re Ervin Service Corp.*, 33 Fed. Supp. 653, 654-655 (W. D. N. Y.); *In re Matisoff*, 36 Fed. Supp. 896, 897 (N. D. Ga.); Compare Sections 3466 and 3467 of the Revised Statutes, and Section 3661 of the Internal Revenue Code (all Appendix, *infra*). Accordingly, there is no support in this record for the appellant's contention that Congress allegedly intended that the three months' limitation of Section 355 should replace the six months' period provided by Section 57n in respect of claims of the United States, on the ground that there is no indication of intent to preserve the six months' period of the latter section for any purpose. (Br. 14.) Significantly, the appellant cites no authority for such incongruous contention. As shown, the contrary is true.

Nor is there any support for the appellant's contention that the legislative history of Sections 57n and 355 indicates that Government claims—specifically embraced in Section 57n, as shown—should be subjected to the same requirements as are other claims generally under Section 355. (Br. 10-14.) In the first place, the provisions of Section 57n are so clear, unambiguous and free from

doubt that resort to the legislative history and statutory construction is, contrary to the trustee's contentions (Br. 8), wholly unnecessary here. (*Caminetti v. United States*, 242 U. S. 470, 485-486.) As has been aptly held, "While rules of statutory construction are applied to solve doubts, they are not applied to create them, and, where there is no ambiguity [as here], there is no need for either a liberal or strict construction." (*South Carolina Produce Ass'n v. Commissioner*, 50 F. 2d 742, 744 (C. A. 4th), citing *Hamilton v. Rathbone*, 175 U. S. 414, 421.) Moreover, there is nothing in the legislative history cited by the appellant or otherwise which indicates, directly or indirectly, that it was the intention of Congress that the Government should be bound by the general statutory provisions of Section 355 which limit the time to three months for filing claims in bankruptcy. (*In re Marine Stevedoring Corp.*, 169 F. 2d 554, 555-556 (C. A. 3d); *United States v. East*, 80 F. 2d 134, 135 (C. A. 8th).) On the contrary, Section 57n embracing "all" claims of the United States is clearly a *special* provision governing such claims, exclusive of Section 355. (*In re Marine Stevedoring Corp.*, *supra*, pp. 555-556.) Such special provisions always prevail over general provisions of a statute. (*Hellmich v. Hellman*, 276 U. S. 233, 236-238.) It is quite clear, moreover, that if, as contended by the appellant (Br. 6, 10-14), Congress had intended that the United States be bound by the provisions of Section 355, instead of Section 57n in which claims of the Government are specifically included, it would undoubtedly have so stated in the former instead of specifically providing therefor by the 1938 amendment in the latter. (*In re Marine Stevedoring Corp.*, *supra*, p. 556; *In re Dorb The Chemist Pharmacies*, 29 Fed. Supp. 832, 834 (S. D. N. Y.).)



In these circumstances, if effect were given to the appellant's claimed construction, it is clear that the specific provisions embracing *all* claims of the United States in Section 57n would be reduced to empty declarations and thereby rendered meaningless. This is not permissible (*Carbon Steel Co. v. Lewellyn*, 251 U. S. 501, 505; *Worth Bros. Co. v. Lederer*, 251 U. S. 507, 510) for "there is no canon against using common sense in construing laws [such as Section 57n here] as saying what they obviously mean" (*Roschen v. Ward*, 279 U. S. 337, 339). While a sensible and reasonable construction—if any were warranted or needed here—is required (*United States v. Katz*, 271 U. S. 354, 362), nevertheless, without any construction, the clear terms of the statute lead irrefragably to the obvious conclusion that the six months' provision of Section 57n is directly applicable to the claim of the United States here in controversy. [R. 19-21.] Finally, since Section 57n imposes limitations on claims of the United States, it must be strictly construed in favor of the United States in order to facilitate the collection of taxes. (*Parrott v. McLaughlin*, 67 F. 2d 397, 398-399 (C. A. 9th), citing, to the same effect, *United States v. Whited & Wheless*, 246 U. S. 552, 561, and *Dupont de Nemours & Co. v. Davis*, 264 U. S. 456, 462; see also *White v. United States*, 305 U. S. 281, 292; *W. P. Brown & Sons Lumber Co. v. Commissioner*, 38 F. 2d 425, 428 (C. A. 6th), affirmed, 282 U. S. 283; *Magruder v. Safe Deposit & Trust Co., of Baltimore*, 121 F. 2d 981 (C. A. 4th); *South Carolina Produce Ass'n v. Commissioner*, 50 F. 2d 742, 744 (C. A. 4th).)

In the light of the foregoing, we submit that the issue here is concluded by *New York v. Irving Trust Co.*, 288 U. S. 329; *In re Marine Stevedoring Corp.*, 169 F. 2d



554 (C. A. 3d); *In re Dorb The Chemist Pharmacies*, 29 Fed. Supp. 832 (S. D. N. Y.); *In re Ervin Service Corp.*, 33 Fed. Supp. 653 (W. D. N. Y.); *In re Matisoff*, 36 Fed. Supp. 896 (N. D. Ga.). The latter four cases were cited by the Collector in support of his motion for reconsideration of the Referee's initial order previously disallowing the claim in question [R. 23-24], adopted and followed by the Referee in his certificate on review [R. 17-18] as supporting his second and final order of May 10, 1950, upholding the validity of the Collector's claim [R. 25-27], and also followed by the District Court, in affirming the Referee's final decision in favor of the Collector, on the authority of *New York v. Irving Trust Co.*, *supra*.

The *New York-Irving Trust Co.* case held (p. 331), as the appellant states (Br. 21), that since the United States was not mentioned in the limitation of the old Section 57n, before the 1938 amendment thereto, it was admittedly not bound by the provisions thereof. Hence, as shown, the United States is likewise not bound by the provisions of Section 355 of the Bankruptcy Act, as amended, for it is not mentioned therein. This plainly negatives the appellant's contention that the District Court's reliance on that case was erroneous on the ground that it was decided before the 1938 amendment to the Bankruptcy Act. (Br. 5, 6, 21-22.) The conclusion is inescapable that if the Supreme Court's ruling that the United States was not bound by the provisions of the old Section 57n (before the 1938 amendment thereto) because it was not mentioned therein, be accepted as binding under the circumstances there—and the appellant does not dispute the correctness

thereof (Br. 21-22)—then it necessarily must follow for the same reason that the United States is not now bound by the provisions of Section 355 here because it is not mentioned therein.

The Third Circuit's decision in the *Marine Stevedoring Corp.* case, *supra*, is on all fours with the present case, as observed by the Referee in reviewing and reversing his prior decision against the Collector. [R. 18.] All his previous doubts in respect of the correctness of the three District Courts' decisions, *supra*, reversing the respective Referees' orders therein holding that Section 355, instead of Section 57n, applied to claims of the United States, vanished upon his being confronted with the decision of the Third Circuit in the *Marine Stevedoring Corp.* case. [R. 18.] In the latter case, an order was entered on May 12, 1944, withdrawing the plan of arrangement purported to have been effected under Chapter XI of the Bankruptcy Act, as amended by the Act of June 22, 1938, Chap. 575, 52 Stat. 840, and adjudicating the debtor a bankrupt, and the trustee was appointed by the Referee in Bankruptcy. Since the Referee had failed to set a date for the first meeting of the creditors with notice thereof, however, the appellate court vacated the judgment of the District Court and remanded the case with directions for the Referee in Bankruptcy to set a date for the first meeting of the creditors, pursuant to Section 55 of the Bankruptcy Act, as amended. Upon so doing, the court stated in respect of Section 355 (pp. 555-556):

\* \* \* all creditors, save those who have special status by reason of the provisions of Section 57, sub. n of the Bankruptcy Act, to be dealt with hereinafter, must file their claims within three months as required by Section 355 if not filed during the course of the Chapter XI proceeding. \* \* \*

The court's further holdings in respect to Section 57n (p. 556) are directly in point and so apt that they are quoted at length:

Claims of the United States or of any State or subdivision thereof are awarded a special period for filing under Section 57, sub. n \* \* \*. Claims of the United States are barred only under Section 57, sub. n, which bars them if not filed within six months after the first date set for the first meeting of creditors unless an extension be procured as provided by the statute. In this connection attention is called to the well considered opinion of Judge Goddard in *In re Dorb The Chemist Pharmacies*, D.C.S.D.N.Y., 29 F. Supp. 832, 833, 834, in which it is stated: "Section 57, sub. n, of the Bankruptcy Act was amended by the Chandler Act, 11 U.S.C.A. Sec. 93, sub. n, to provide that all claims, including claims of the United States, or any state or subdivision thereof, must be filed within a six months' period. The amendment expressly includes them so as to bar such claims after six months. Such claims are barred only under Sec. 57, sub. n, of the Bankruptcy Act which bars them if not filed within six months after the first date set for the first meeting of creditors. Evidence that the Congress intended the six months' period to apply to such claims when reorganization under Chapter XI failed and adjudication ordered, is found in Sec. 378, sub. 2 of the Bankruptcy Act, 11 U.S.C.A. Sec. 778, sub. 2, which provides that when in Chapter XI proceeding, bankruptcy is directed to be proceeded with, the proceeding thereof shall be conducted as far as possible 'in the same manner and with like effect as if a bankruptcy petition for adjudication in bankruptcy had been filed \* \* \*.' It seems clear therefore that the Congress in enacting the Chandler Act expressly intended the six months' bar to cover claims

of the United States, a state, or a municipality, for if the Congress had desired to make the three months' bar apply to such claims, it would undoubtedly have included them in Sec. 355."

To the same effect, see *In re Ervin Service Corp.*, 33 Fed. Supp. 653 (W.D.N.Y.) and *In re Matisoff*, 36 Fed. Supp. 896 (N. D. Ga.) [R. 18, 24], both of which, following *In re Dorb The Chemist Pharmacies*, 29 Fed. Supp. 832 (S.D. N.Y.), reversed the Referees' erroneous orders holding that Section 355, instead of Section 57n, applied to claims of the United States; and therefore they, like the *Dorb The Chemist Pharmacies* case, are in harmony with the Third Circuit's decision in the *Marine Stevedoring Corp.* case, *supra*.

The foregoing cases, we submit, completely negative all the appellant's contentions to the contrary here. Substantially all the contentions and arguments offered by the appellant here were presented and overruled by the courts in those cases, and the appellant has furnished no authority to the contrary. It is quite apparent that the appellant's criticism (Br. 15-20) of the rationale of the *Marine Stevedoring Corp.* case, which adopted in large part the sound and persuasive reasoning of the District Court in the *Dorb The Chemist Pharmacies* case, *supra*, is self-serving, without basis, and clearly untenable. Moreover, there is no basis in the record, nor does the appellant cite any *applicable* authority for his contradictory statements (Br. 15, 16, 20), that the court in neither case actually "construed and interpreted" the statutory provisions involved (Sections 57n and 355), and that therefore "such constructions and interpretations" by the Third Circuit in the *Marine Stevedoring Corp.* case are unreasonable and effect illogical and mischievous results, not intended by



Congress. (Br. 15-20.) The decisions referred to clearly show the contrary.

The many cases cited by the appellant in support of his position (Br. 14, 22), such as *New York v. Saper*, 336 U. S. 328, and *In re Knox-Powell-Stockton Co.*, 100 F. 2d 979 (C.A. 9th), for example, are clearly distinguishable. They involved issues and factual situations not presented here.

### Conclusion.

The order of the District Court, affirming the final order of the Referee in Bankruptcy in favor of the Collector, is correct and should therefore be affirmed upon review by this Court.

Respectfully submitted,

ELLIS N. SLACK,  
*Acting Assistant Attorney General.*

ROBERT N. ANDERSON,  
S. DEE HANSON,  
*Special Assistants to the Attorney General.*

WALTER S. BINNS,  
*United States Attorney.*

E. H. MITCHELL,  
EDWARD R. McHALE,  
*Assistant United States Attorneys.*

December, 1951.









## APPENDIX.

Bankruptcy Act, c. 541, 30 Stat. 544 [as amended by Sec. 1 of the Act of June 22, 1938, c. 575, 52 Stat. 840]:

SEC. 55. *Meetings of Creditors.*—a. The court shall cause the first meeting of the creditors of a bankrupt to be held not less than ten nor more than thirty days after the adjudication \* \* \*. If such meeting should by any mischance not be held within such time, the court shall fix the date, as soon as may be thereafter, when it shall be held.

\* \* \* \* \*

[11 U. S. C. 1946 ed., Sec. 91.]

SEC. 57. *Proof and Allowance of Claims.*— \* \* \*

\* \* \* \* \*

n. Except as otherwise provided in this Act, all claims provable under this Act, including all claims of the United States and of any State or subdivision thereof, shall be proved and filed in the manner provided in this section. Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed: *Provided, however,* That the court may, upon application before the expiration of such period and for cause shown, grant a reasonable fixed extension of time for the filing of claims by the United States or any State or subdivision thereof: \* \* \*. When in any case all claims which have been duly allowed have been paid in full, claims not filed within the time hereinabove prescribed may nevertheless be filed within such time as

the court may fix or for cause shown extend and, if duly proved, shall be allowed against any surplus remaining in such case.

[11 U. S. C. 1946 ed., Sec. 93.]

SEC. 64. *Debts Which Have Priority.*—a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be \* \* \*; (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof; *Provided*, That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court: *And provided further*, That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court; \* \* \*

\* \* \* \* \*

[11 U. S. C. 1946 ed., Sec. 104.]

SEC. 355. Upon the entry of an order under the provisions of this chapter directing that bankruptcy be proceeded with, only such claims as are provable under section 63 of this Act shall be allowed and, except as provided in section 354 of this Act, claims not already filed may be filed within three months after the first date set for the first meeting of creditors, held pursuant to section 55 of this Act, or, if such date has previously been set, then within three months after the mailing of notice to creditors of the entry of the order directing that bankruptcy be proceeded with.

[11 U. S. C. 1946 ed., Sec. 755.]



SEC. 376. If an arrangement is withdrawn or abandoned prior to its acceptance, or is not accepted at the meeting of creditors or within such further time as the court may fix, or if the money or other consideration required to be deposited is not deposited or the application for confirmation is not filed within the time fixed by the court, or if confirmation of the arrangement is refused, the court shall—

\* \* \* \* \*

(2) where the petition was filed under section 322 of this Act, enter an order, upon hearing after notice to the debtor, the creditors, and such other persons as the court may direct, either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act or dismissing the proceeding under this chapter, whichever in the opinion of the court may be in the interest of the creditors.

[11 U. S. C. 1946 ed., Sec. 776.]

SEC. 377. Where the court has retained jurisdiction after the confirmation of an arrangement and the debtor defaults in any of the terms thereof or the arrangement terminates by reason of the happening of a condition specified in the arrangement, the court upon hearing after notice to the debtor, the creditors, and such other persons as the court may direct shall—

\* \* \* \* \*

(2) where the petition has been filed under section 322 of this Act, enter an order either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act or dismissing the

proceeding under this chapter, whichever in the opinion of the court may be in the interest of the creditors.

[11 U. S. C. 1946 ed., Sec. 777.]

SEC. 378. Upon the entry of an order directing that bankruptcy be proceeded with—

\* \* \* \* \*

(2) in the case of a petition filed under section 322 of this Act, the proceeding shall be conducted, so far as possible, in the same manner and with like effect as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered on the day when the petition under this chapter was filed; and the trustee nominated by creditors under this chapter shall be appointed by the court, or, if not so nominated or if the trustee so nominated fails to qualify within five days after notice to him of the entry of such order, a trustee shall be appointed as provided in section 44 of this Act.

[11 U. S. C. 1946 ed., Sec. 778.]

SEC. 659. In advance of distribution to creditors, there shall first be paid in full, out of the moneys paid in by or for the debtor, and the order of payment shall be—

\* \* \* \* \*

(6) the debts entitled to priority, in the order of priority, as provided by subdivision *a* of section 64 of this Act.

[11 U. S. C. 1946 ed., Sec. 1059.]

Revised Statutes:

SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

[31 U. S. C. 1946 ed., Sec. 191.]

SEC. 3467 [as amended by Sec. 518(a) of the Revenue Act of 1934, c. 277, 48 Stat. 680, 760]. Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid.

[31 U. S. C. 1946 ed., Sec. 192.]

Internal Revenue Code:

SEC. 3661. ENFORCEMENT OF LIABILITY FOR TAXES  
COLLECTED.

Whenever any person is required to collect or withhold any internal-revenue tax from any other person and to pay such tax over to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose.

[26 U. S. C. 1946 ed., Sec. 3661.]

No. 13077

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate  
of Radiophone Corporation, Bankrupt,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

## REPLY BRIEF OF APPELLANT.

---

CRAIG, WELLER & LAUGHARN,

HUBERT F. LAUGHARN,

THOMAS S. TOBIN,

A. J. BUMB,

111 West Seventh Street,  
Los Angeles 14, California,

*Attorneys for Appellant.*

FILED

JAN - 7 1952





## TOPICAL INDEX

### PAGE

Analysis of appellee's brief..... 1

Conclusion ..... 15

## TABLE OF AUTHORITIES CITED

CASES	PAGE
City of New York v. Saper, 336 U. S. 328, 93 L. Ed. 710, 69 S. Ct. 554.....	13
Crawford v. Burke, 195 U. S. 176, 49 L. Ed. 147, 25 S. Ct. 9....	11
Fink v. O'Neil, 106 U. S. 272, 27 L. Ed. 196, 1 S. Ct. 325.....	12
Knox-Powell-Stockton Co., In re, 100 F. 2d 997.....	14
Marine Stevedoring Corp., In re, 169 F. 2d 554.....	12, 13
New York v. Irving Trust Co., 288 U. S. 329, 53 S. Ct. 389, 77 L. Ed. 815.....	11, 14
Summers v. Collector of Taxes, 92 F. 2d 819.....	11
West v. Lea Bros., 174 U. S. 590, 43 L. Ed. 1098, 19 S. Ct. 839 .....	4

### MISCELLANEOUS

House Report 12889, 74th Cong., 2d Sess. (1936) 180.....	1, 5
House Report 1409, 75th Cong., 1st Sess. (1937).....	1
Senate Report 1916, 75th Cong., 3rd Sess., Calendar No. 2022 (1938) .....	1

### STATUTES

Bankruptcy Act, Sec. 57-n.....	2, 3, 4, 5, 6, 7, 8, 9, 10, 14
Bankruptcy Act, Sec. 64.....	4
Bankruptcy Act, Sec. 64-a(4), (5).....	4
Bankruptcy Act, Sec. 355.....	2, 3, 5, 6, 7, 8, 9, 10, 14
Bankruptcy Act, Sec. 378(2) .....	14
Bankruptcy Act, Sec. 3661.....	4
Revised Statutes, Sec. 3466.....	4
Revised Statutes, Sec. 3467.....	4

### TEXTBOOKS

8 Collier on Bankruptcy (14th Ed.), p. 1013, Note 43.....	1, 5
8 Collier on Bankruptcy (14th Ed., 1940), p. 1017.....	5
Webster's 20th Century Dictionary.....	5

No. 13077

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estate  
of Radiophone Corporation, Bankrupt,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

## REPLY BRIEF OF APPELLANT.

---

We have received the answering brief of the appellee and deem it essential that we reply thereto.

### Analysis of Appellee's Brief.

It is respectfully urged that the appellee's brief submitted herein, in its entirety, completely ignores the various House and Senate Committee reports (Collier on Bankruptcy, 14th Ed., Vol. 8, P. 1013, N. 43, Analysis of H. R. 12889, 74th Cong., 2nd Sess. (1936) 180; H. R. 1409, 75th Cong., 1st Sess. 1937; Sen. Reports 1916, 75th Cong., 3rd Sess., Calendar No. 2022 (1938)), cited by appellant (App. Br. pp. 10 to 14), which do positively demonstrate that the intent of Congress behind its amendments of, and addition to the Bankruptcy Act in 1938, was to the end *that the United States, its officers, agents*

*and bureaus, as a claimant be placed on a parity with and subjected to the same requirements as other claimants and be bound by section 355 of the Bankruptcy Act.*

In particular, the court's attention is directed to the following general phases of the appellee's brief, together with the appellant's comments thereon:

## I.

The appellee (Br. pp. 8 to 12) theorizes that since section 57-n refers to "all claims of the United States," that section 355, which does not specifically mention the United States, is not and cannot be an exception to section 57-n.

A. The appellee's emphasis on that portion of section 57-n which provides for "all claims of the United States" (Br. p. 10), is made in an attempt to demonstrate that no section of the Bankruptcy Act, other than 57-n, can possibly be applied or considered in determining whether or not its claim is timely filed. However, the appellee conveniently overlooks and fails to consider the opening phrases of section 57-n in their entirety, which provide: "Except as otherwise provided in this Act, *all claims provable under this Act, including all claims of the United States and of any State or subdivision thereof, shall be proved and filed in the manner provided in this section. . . .*" (Italics added.) From this it can be readily observed that Congress intended that *all claims*, whether or not held by general creditors, prior labor claimants, or the government, because of some tax or contract obligation, shall and must be filed as per the provisions of section 57-n, it being



specifically provided therein, however, that the said section might be modified by a provision found elsewhere in the "Act." What other reason could Congress have had for commencing this section (57-n) with the words—"Except as otherwise provided in this Act"? We are left with no alternative but to consider section 355 as one of the exceptions referred to by section 57-n. The said sections must, of necessity, be read and construed together to the end as previously set forth by the appellant (App. Br. p. 25), that: EXCEPT IN THE SITUATION COVERED BY SECTION 355 WHEREIN A THREE MONTH PERIOD WILL PREVAIL, ALL CLAIMS PROVABLE UNDER THE BANKRUPTCY ACT, INCLUDING THOSE OF THE UNITED STATES OR ANY STATE OR SUBDIVISION THEREOF, SHALL BE PROVED AND FILED WITHIN SIX MONTHS AFTER THE FIRST DATE SET FOR THE FIRST MEETING OF CREDITORS AS PROVIDED IN SECTION 57-n.

B. Contrary to the appellee's contention (Br. p. 11), in construing sections 57-n and 355, as heretofore done by the appellant (App. Br. pp. 23 to 26), there is no need to specifically mention the United States in section 355, as it has already been expressly mentioned in the *general* provision for the filing of claims, section 57-n. Section 355 is merely a modification of, or an exception to, this *general* provision.

C. Further, the appellee emphasizes that portion of section 57-n authorizing the United States to petition for an extension of time in which to file its claim (Br. pp. 11 to 12), concluding that this proviso prevents section 355 from applying to the United States. However, here again the appellee is attempting to isolate section 57-n from the other sections of

the Bankruptcy Act. In so doing, it is completely ignoring the "Except as otherwise provided in this Act" provision of the said section and does also completely disregard the rules of statutory interpretation which provide that every section, subsection and provision of a statute should be construed together in order to ascertain the true legislative intent. (See App. Br. pp. 7 to 9; *West v. Lea Bros.*, 174 U. S. 590, 43 L. Ed. 1098 (1899), 19 S. Ct. 839.)

D. The appellee refers the court to sections 3466 and 3467 of the Revised Statutes and section 3661 of the Internal Revenue Code as support for its position that only section 57-n, which specifically mentions the United States, is binding upon it. (Br. p. 12.) The first two of the said sections (3466 and 3467) referred to by the appellee provide that obligations due the United States by a debtor must be paid prior to obligations to other creditors. The latter section (3661), provides that a person required to collect or withhold any revenue tax from another person, holds the said funds in trust for the United States. Actually, these sections serve to confuse, rather than clarify the problem herein presented, as they have nothing whatsoever to do with the Bankruptcy Act. Section 64 of the said Act, controlling in all bankruptcy proceedings, repudiates these sections and places all taxes (including those due the United States), in a fourth order of priority. Other debts due the United States are placed in a fifth order of priority. (Sec. 64-a(4) (5).)

In concluding this, the first phase of its brief, the appellee remarks that the appellant has cited no "authority" for his contention that Congress in-

tended the three month period of section 355 to entirely replace the six month period of section 57-n (Br. p. 12). It is to be noted that the appellant's statement to this effect (App. Br. p. 14), is actually a quotation from Collier on Bankruptcy, 14th Ed. (1940), Vol. 8, p. 1017, which is based upon an Analysis of H. R. 12889, 74th Cong., 2nd Sess. (1936) 180, found in the same volume of Collier, p. 1013, n. 43.

In Webster's 20th Century Dictionary, "authority" is defined: "7. In law, a precedent or decision of a court; an official declaration; an eminent opinion or saying; anything calculated to influence the opinion of others, as the decision of a higher court."

We do not believe that (up to the instant time) the particular point here presented has been fully considered by any court, and, most certainly, upon the decision herein there will be ample "authority," the lack of which now concerns the appellee.

## II.

The next phase of the appellee's brief is to the effect that the legislative history of sections 57-n and 355 does not indicate that the United States of America, its officers, agents and bureaus, as claimant, should be bound by section 355 of the Bankruptcy Act. (Br. pp. 12 to 14.)

A. Here (Br. pp. 12 to 13), the appellee refers to the provisions of section 57-n as being "so clear, unambiguous and free from doubt" that resort to legislative history and statutory interpretation is unnecessary. Again, the appellee has refused to consider the Bankruptcy Act as a whole, but rather, has focused attention on the isolated provisions of sec-

tion 57-n and even then, only to a portion of its provisions. However, when we consider its opening phrase: "Except as otherwise provided in this Act," certainly then, we must consider the construing of section 57-n together with any exception or modification thereto, such as section 355, in a factual situation such as herein presented. Are these opening words of the said section to be overlooked and considered mere window dressing, or are they to be considered a part of the section and given a meaning?

B. With respect to the appellee's contention that nothing in the legislative history referred to by the appellant "directly or indirectly" indicates an intention upon the part of Congress, that the United States, its officers, agents and bureaus, as a claimant, be bound by section 355 of the Bankruptcy Act (Br. p. 13), it is respectfully submitted that further consideration be given to Appellant's Opening Brief, particularly pages 10 to 14, inclusive.

C. In referring to section 57-n which emphasizes "all claims of the United States" as a "special" provision governing the filing of claims, which must prevail over a "general" provision such as section 355 (Br. p. 13), it becomes apparent that the appellee must, at least, be slightly confused.

How section 57-n, which provides—"Except as otherwise provided in this Act, *all claims provable under this Act, including* all claims of the United States and of any State or subdivision thereof, shall be proved and filed in the manner provided in this section \* \* \*," (italics added) may be considered a "special" provision governing the filing of claims in bankruptcy proceedings, with section 355, being



considered a “general” provision, when it merely governs the filing of claims in an isolated set of circumstances which are the exception rather than the rule in bankruptcy proceedings as a whole, is not conceivable.

Certainly, if the “special” provision is to prevail, as emphatically asserted by the appellee (Br. p. 13), then by its own admission, the United States, its officers, agents and bureaus, as a claimant, is and must be bound by the “special” provisions of section 355, which is one of the exceptions referred to in the opening phrase of section 57-n—“Except as otherwise provided in this Act \* \* \*.”

D. The logic of the appellee is even more questionable when it asserts that if Congress intended that the United States be bound by section 355 *instead* of section 57-n, it would have specifically mentioned the United States in the former section rather than the latter (Br. p. 13). Here again, the appellee persists in its steadfast refusal to construe together the pertinent sections of the Bankruptcy Act pertaining to the filing of claims, namely, sections 57-n *and* 355. The appellant, however, in harmoniously construing the said sections (App. Br. pp. 23 to 25), unequivocally demonstrates that not one, but both of the said sections apply to the United States, and that the sole and entire purpose served by section 355 is to modify the six month provisions of section 57-n under certain circumstances, to one of three months, with all of the other provisions of the latter general section remaining undisturbed.



E. In the matter of statutory interpretation, the appellee has stated that the rules pertaining thereto are not applied where there is no ambiguity, and that in the situation before the court there is no need for a *liberal* or *strict* construction. (Br. p. 13.) However, further along in its argument (Br. p. 14), the appellee *demand*s that the court *strictly* construe section 57-n (not sections 57-n *and* 355), as it imposes a limitation upon the claims of the United States. Are not these statements of the appellee inconsistent and contradictory?

F. In concluding this argument relative to the legislative history herein involved, the appellee insists that the appellant's construction of the sections in question, 57-n and 355, reduces the words "all claims of the United States" to "meaningless" and "empty declarations." (Br. p. 14.) It is submitted that in steadfastly refusing to acknowledge the existence of the opening phrase of section 57-n, "Except as otherwise provided in this Act," and further, in refusing to acknowledge the relationship of the phrases, "all claims provable under this Act, *including* all claims of the United States \* \* \*" (italics added), the appellee is overlooking, or ignoring, words that do have a meaning and a purpose, that must, of necessity, be considered in any interpretation of the sections involved. The words "*including* all claims of the United States" (italics added), are merely a specific enumeration of certain claims included in "all claims provable under this Act," and as such, are referring to tax claims as well as any and all other debts that might be due and owing the United States as a claimant. As an analysis of sec-

tion 57-n demonstrates, the words therein, "*including* all claims of the United States" (italics added), do not direct that the claims of the United States, whether provable in regular bankruptcy proceedings or in Chapters X, XI, XII and XIII proceedings, must be filed within the six month period after the first date set for the first meeting of creditors, but rather, that the words "*including* all claims of the United States" (italics added), are merely a specification of certain claims included in the sections preceding phrase "all claims provable under this Act," and as such, bound by the provision, "Except as otherwise provided in this Act."

It is to be noted that in the opening phrase of section 57-n, the authors of the law refer to the "Act," *not* to this or that *Chapter* of the "Act." Certainly then, it is the appellee, not the appellant, who is reducing the provisions of sections 57-n and 355 to "meaningless" and "empty declarations."

G. PURPOSE OF 1938 AMENDMENT.—When the Bankruptcy Act was recast in 1938 the legislature was determined to bring the ever growing list of tax claimants "into line." That is, to require both in the interests of uniformity, and also expedition and economy of administration, that the tax claimants come forward and assert their claims in the same manner as any other creditor, with one exception, *i. e.*, the right to an extension of time if applied for within the statutory period.

This new casting of the law was an innovation. Instead of costly, laborious, slow and uncertain processes of the bankruptcy court "searching out" the

tax claims, it required that these claims be brought forward by the claimants in the same way as any other creditor.

The change was long overdue. So, when the new Act was cast, because of the adverse case law on the subject, there was added to section 57-n the positive declaration, "*including* all claims of the United States \* \* \*." (Italics added.)

Under Chapter XI it is not mandatory that claims be filed in order to participate under the Plan of Arrangement.

However, on the other hand, when a Chapter XI proceeding fails and "ordinary bankruptcy" is resorted to, then all of the rules of "ordinary bankruptcy" apply, with very few exceptions, one of these being that the time for filing claims, if it has not already expired, is shortened to a period of three months. (Sec. 355.) This 1938 amendment was a logical, common sense proposition, and follows somewhat the new idea of expedition in bankruptcy administration. Why wait a six month period for the filing of claims in a proceeding which might possibly have been already pending for several months. Since 1938, practical experience has shown that the three month period is more than adequate when the proceeding changes from a Chapter XI to ordinary bankruptcy liquidation. Why take more time and incur more expense? And, especially, why should not the taxing agencies be included in the same class as other creditors and treated in the same manner?

III.

The third phase of the appellee's argument is devoted to the proposition that the problem herein presented is controlled by the case of *New York v. Irving Trust Co.*, 288 U. S. 329, 53 S. Ct. 389, 77 L. Ed. 815 (Br. pp. 14 to 16).

A. In clinging to this proposition, the appellee refuses to recognize that the Bankruptcy Act was amended and supplemented in 1938, and that thereby, the claims of the United States were placed on a parity with other claimants except as to the allowance of additional time, upon request, in which to prepare and file its claim.

B. The appellee entirely disregards the rules of statutory interpretation considered by the appellant (App. Br. p. 8), to the effect that:

1. Later amendments to a statute cannot be ignored in the construing thereof.

*Summers v. Collector of Taxes* (C. C. A. 8th Cir., 1937), 92 F. 2d 819.

2. When a change is made in phraseology in the reenactment of a statute, it gives rise to a presumption of a change of intent on the part of the legislative body, from that expressed in the former statute.

*Crawford v. Burke*, 195 U. S. 176, 49 L. Ed. 147, 25 S. Ct. 9.

C. Nor does the appellee consider that rule of statutory interpretation requiring modification of the principle expounded by the court in the *Irving Trust*



case, in a situation where the demands of a contrary public policy include the government within the principle and intendment of the statute, which here, is the expediting of the administration of bankrupt estates, the eliminating of controversies as to the effectiveness of bar orders as to the United States, and the placing of all claimants on a parity. (App. Br. pp. 21 to 22; *Fink v. O'Neil*, 106 U. S. 272, 27 L. Ed. 196, 1 S. Ct. 325.)

#### IV.

The final phase of the appellee's argument (Br. pp. 16 to 18) is devoted to extensive quotations from the case of *In re Marine Stevedoring Corp.* (C. C. A. 3rd, 1948), 169 F. 2d 554, together with cases on which the said decision is based.

A. As for the appellee's statement that the cases to which it refers negative the appellant's contentions (Br. p. 18), it is submitted that such a statement may well be found by this court to be in error. Where, in any of the cases cited by the appellee, do the indicated courts:

1. Consider the rules of statutory intention involved where an amendment is made to an existing statute, indicating a change in legislative intent. (App. Br. pp. 7 to 9.)

2. Give regard to the intent of the legislature as evidenced by the various House and Senate Committee reports cited by appellant (App. Br.



pp. 10 to 14), wherein it was *expressly stated* that the 1938 amendments to the Bankruptcy Act were designed to expedite bankruptcy administration, do away with the controversies concerning bar orders directed against the United States, and subject the government to the same requirement as other claimants in the filing of claims. Nor was consideration given to the express admonition of these same Congressional Committees that these reasons were to be considered in the construing of the provisions of Chapters X, XI, XII and XIII as to the filing of claims.

3. Consider the expression of the Supreme Court of the United States in the case of *City of New York v. Saper*, 336 U. S. 328, 93 L. Ed. 710, 69 S. Ct. 554 (App. Br. p. 14), to the end that:

*"Tax claims are treated the same as other debts except for the fourth priority of payment."*  
(Emphasis added.)

4. Consider the illogical and unintended result which places the United States in a less advantageous position than that of other creditors, when we extend to its logical conclusion the rule laid down in the *Marine Stevedoring* case, in a factual situation wherein a Chapter XI petition is filed in a regular bankruptcy proceeding five months after the original petition was filed, with the said Plan being rejected three months later and an order of

adjudication immediately following. The results—the general creditors have three months to file a claim; the United States is unable to file a claim because the six month period of section 57-n has lapsed. (App. Br. pp. 18 to 20.)

5. Consider a possible modification of the principle set down in the *Irving Trust* case because of a contrary public policy and intent as hereinbefore mentioned (App. Br. pp. 21 and 22), which principle was adhered to by this court in the case of *In re Knox-Powell-Stockton Co.* (1939), 100 F. 2d 997; or, consider the possibility of a change of legislative intent because of the 1938 amendment to the Bankruptcy Act. (App. Br. pp. 21 to 22.)

6. Even attempt to logically construe the only two pertinent sections relating to the filing of claims in the factual situation herein presented, sections 57-n and 355 (*not 57-n and 378, sub. 2*), as done by the appellant (App. Br. pp. 23 to 25), wherein he concluded that—EXCEPT IN THE SITUATION COVERED BY SECTION 355 WHEREIN A THREE MONTH PERIOD WILL PREVAIL, ALL CLAIMS PROVABLE UNDER THIS ACT, INCLUDING THOSE OF THE UNITED STATES AND ANY STATE OR SUBDIVISION THEREOF, SHALL BE PROVED AND FILED IN THE MANNER PROVIDED IN THIS SECTION, TO WIT, CLAIMS NOT FILED WITHIN SIX MONTHS AFTER THE FIRST DATE SET FOR THE FIRST MEETING OF CREDITORS SHALL NOT BE ALLOWED.

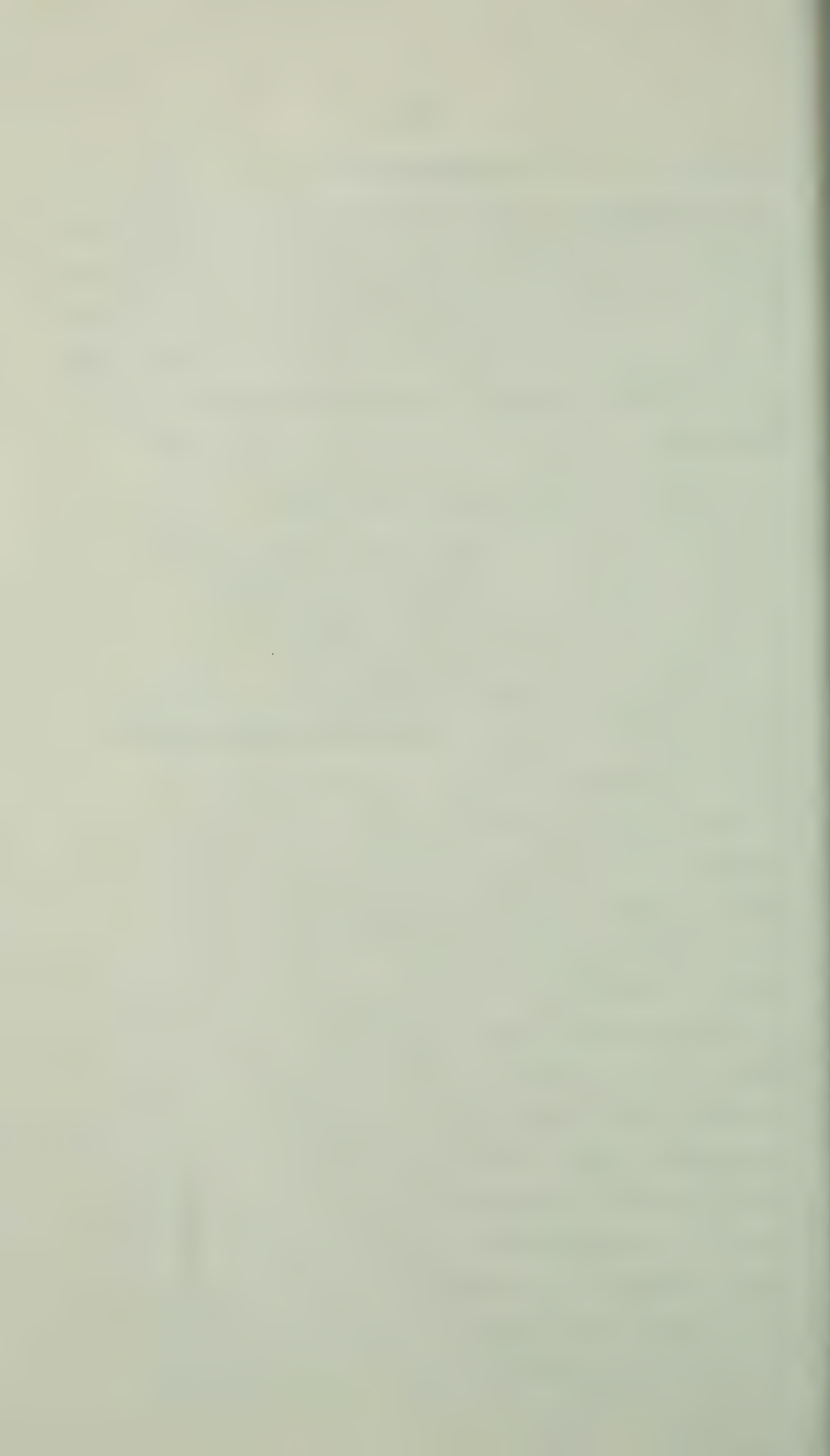
### Conclusion.

It is respectfully submitted that the appellee has failed to refute any of the arguments offered by the appellant and that the order of the District Court be reversed and the claim of the Collector of Internal Revenue, which was not filed within the period set forth in section 355, be disallowed.

Respectfully submitted,

CRAIG, WELLER & LAUGHARN,  
HUBERT F. LAUGHARN,  
THOMAS S. TOBIN,  
A. J. BUMB,

*Attorneys for Appellant.*



No. 13078

---

United States  
Court of Appeals  
for the Ninth Circuit.

---

SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,

Appellant,

vs.

ROGER N. LIBBEY,

Appellee.

---

Transcript of Record

---

Appeal from the United States District Court for the  
Northern District of California,  
Southern Division.

FILED

NOV 14 1951

PAUL P. O'BRIEN

CLERK

---





No. 13078

---

United States  
Court of Appeals  
for the Ninth Circuit.

---

SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,

Appellant,

vs.

ROGER N. LIBBEY,

Appellee.

---

Transcript of Record

---

Appeal from the United States District Court for the  
Northern District of California,  
Southern Division.



## INDEX

---

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

### PAGE

Additional Instruction Given in Response to the Inquiry of the Jury.....	28
Affidavit of Daniel V. Ryan in Opposition to Defendant's Motion to Amend Answer.....	16
Amendment to Answer.....	23
Answer .....	8
Appeal:	
Certificate of Clerk to Record on.....	328
Notice of.....	35
Supplemental Notice of.....	36
Appellant's Statement of Points and Designa- tion of Record.....	331
Certificate of Clerk to Record on Appeal.....	328
Complaint .....	3
Demand for Jury Trial.....	11
Denial of Motion for Order Permitting Amend- ment to Answer to Complaint, Without Preju- dice to Renew Motion at Time of Trial.....	17
Instructions Requested by Defendant.....	26

INDEX	PAGE
Judgment on Verdict.....	29
Motion for Order Permitting Defendant to Amend Answer to Complaint Filed May 15, 1951.....	11
Affidavit of R. Mitchell S. Boyd.....	13
Notice of Motion.....	12
Order Permitting Amendment to Answer to Complaint.....	15
Motion for Order Permitting Defendant to Amend Answer to Complaint Filed June 20, 1951.....	18
Affidavit of R. Mitchell S. Boyd.....	20
Notice of Motion.....	19
Order Permitting Amendment to Answer to Complaint.....	22
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	35
Notice of Motion for New Trial.....	31
Order Denying Motion for Judgment Notwith- standing Verdict.....	36
Order Denying Motion for New Trial.....	34
Reporter's Transcript.....	42



INDEX

PAGE

Witness, Defendant's:

Cress, Walter William

—direct .....	249
—cross .....	259
—redirect .....	263

Witnesses, Plaintiff's:

Guterman, Joseph

—direct .....	120, 141
—cross .....	140, 141

Libbey, Roger Norman

—direct .....	43
—cross .....	104, 143
—redirect .....	162, 175
—recross .....	173

Petersen, Theadore W.

—direct .....	176
—cross .....	199
—redirect .....	209

Stipulation and Order.....	40
----------------------------	----

Supersedeas Bond.....	37
-----------------------	----

Supplemental Notice of Appeal.....	36
------------------------------------	----

Verdict .....	29
---------------	----



## NAMES AND ADDRESSES OF ATTORNEYS

A. B. DUNNE,

DUNNE, DUNNE & PHELPS,

333 Montgomery St.,

San Francisco, Calif.,

Attorneys for Defendant and Appellant.

RYAN AND RYAN,

800 Phelan Building,

San Francisco, Calif.,

Attorneys for Plaintiff and Appellee.



In the United States District Court, Northern  
District of California, Southern Division

No. 30085

ROGER N. LIBBEY,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,

Defendant.

COMPLAINT FOR DAMAGES — PERSONAL  
INJURIES BROUGHT UNDER THE FED-  
ERAL EMPLOYERS' LIABILITY ACT  
AND THE FEDERAL BOILER INSPEC-  
TION ACT

Plaintiff complains of defendant and for cause  
of action alleges:

Count I.

That at all times herein mentioned defendant was  
and now is a corporation organized and existing  
under and by virtue of the laws of the State of  
Delaware and doing business in the State of Cali-  
fornia and other States; that defendant has its  
principal office and does a railroad business in the  
City and County of San Francisco, State of Cali-  
fornia; that defendant was at all times herein  
mentioned, and now is, engaged in the business of  
a common carrier by railroad in interstate com-  
merce; that at all times herein mentioned plaintiff  
was employed by defendant in such interstate com-  
merce.



## II.

That the action set forth in this count is brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U.S.C.A., Sections 51, et seq., and the Federal Boiler Inspection Act, 45 U.S.C.A., Section 23.

## III.

That on or about the 11th day of August, 1950, between the hours of 10 to 11 p.m. thereof, plaintiff was employed by defendant as a student fireman at Roseville, California.

## IV.

That at said time and place plaintiff, acting in his capacity as a student fireman, was seated on the fireman's seat of a certain switch engine; that while plaintiff was so seated the operator of said engine injected a stream of oil into the fire box of said locomotive for the purpose of starting the same; that as he injected said oil the fire in said fire box suddenly flashed or flared back into the cab of said locomotive and burned plaintiff so that in order to escape from said fire and further burning, plaintiff jumped from the window of said locomotive to the ground and thereby received the injuries herein-after described. The proximate cause of said injuries was the violation by defendant of the Federal Boiler Inspection Act, 45 U.S.C.A., Section 23, in that the boiler, fire box and appurtenances generally of said locomotive were not in a proper condition to permit said locomotive being operated, and in that said locomotive was unsafe to operate in the

service to which it was put on said occasion, and because said locomotive could not be employed in the active service of defendant without unnecessary peril to life or limb.

Said fire box was in improper condition and unsafe because oil could not be injected into said fire box without flashing back into the cab of said locomotive, where of necessity the fireman and engineer were required to be stationed. Plaintiff's injuries consist of the following:

A compound fracture of the right femur.

A fracture of the tibia and fibula of the right leg.

A complete shattering of the right knee.

A badly bruised and wrenched left knee.

Severe burns of the right hand.

An injury to plaintiff's back, the exact nature of which he does not know at the present time.

## V.

That by reason of the premises plaintiff has been damaged in the sum of One Hundred and Fifty Thousand Dollars (\$150,000.00).

## Count II.

As and by way of a second cause of action, plaintiff complains and alleges:

### I.

Plaintiff repeats herein verbatim the allegations of paragraphs I and III of the first cause of action

herein with the same force and effect as if said allegations were set forth herein verbatim.

## II.

That this second cause of action is brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U.S.C.A., Section 51, et seq.

## III.

That at said time and place plaintiff, acting in his capacity as a student fireman, was seated on the fireman's seat of a certain switch engine; that while plaintiff was so seated the operator of said engine injected a stream of oil into the fire box of said locomotive for the purpose of starting the same; that as he injected said oil the fire in said fire box suddenly flashed or flared back into the cab of said locomotive and burned plaintiff so that in order to escape from said fire and further burning, plaintiff jumped from the window of said locomotive to the ground and thereby received the injuries hereinafter described.

That said injuries were proximately caused by the carelessness and negligence of the defendant in that the operator of said locomotive squirted oil into said fire box without first closing the door of said fire box, and by the carelessness and negligence of the defendant in failing to properly clean and maintain said locomotive and its fire box, in that said fire box was permitted to be in such a dirty condition that oil injected into the same would flash back into

the cab of said locomotive. That said injuries consist of the following:

A compound fracture of the right femur.

A fracture of the tibia and fibula of the right leg.

A complete shattering of the right knee.

A badly bruised and wrenched left knee.

Severe burns of the right hand.

An injury to plaintiff's back, the exact nature of which he does not know at the present time.

IV.

That by reason of the premises plaintiff has been damaged in the sum of One Hundred and Fifty Thousand Dollars (\$150,000.00).

Wherefore, plaintiff prays judgment against defendant for the sum of One Hundred and Fifty Thousand Dollars (\$150,000.00) and costs of suit herein.

Dated San Francisco, California, October 13, 1950.

RYAN & RYAN,

By /s/ THOS. C. RYAN,

Attorneys for Plaintiff.

[Endorsed]: Filed October 13, 1950.

[Title of District Court and Cause.]

### ANSWER

Comes Now, Southern Pacific Company, a corporation, the defendant above named, and answering the complaint of plaintiff on file herein, and each alleged cause of action thereof, shows as follows:

#### I.

At all times mentioned in the complaint and herein, defendant was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Delaware, and was qualified to do business, and doing business in the State of California, and in other states, and was engaged among other activities, in the business of a common carrier by railroad in interstate and intrastate commerce in the State of California, and in other states. In the State of California defendant has a principal place of business in the City and County of San Francisco. On or about the 11th day of August, 1950, between the hours of 10 and 11 o'clock p.m. thereof, plaintiff was employed by defendant as a student fireman at Roseville, California. At said time and place, plaintiff was in a certain switch engine. Thereafter plaintiff suffered certain burns and a fracture of the right leg.

#### II.

Defendant is without information or belief on the subject sufficient to enable it to answer the allegations of the complaint, and each alleged cause



of action thereof, in respect of plaintiff's conduct or the nature or extent of his injuries. Defendant denies each and every allegation of the complaint, and each alleged cause of action thereof, not hereinabove admitted or denied. Defendant denies the allegations of paragraphs I, II, IV and V of the first alleged cause of action of the complaint and paragraphs I, II, III and IV of the second alleged cause of action of the complaint, save as hereinabove admitted or denied. Defendant denies that plaintiff has been damaged in the sum of \$150,000.00, or any lesser or greater sum, or any sum at all.

And for a Second, Separate and Independent Answer and Defense to the complaint, and to each alleged cause of action thereof, defendant shows as follows:

I.

Defendant here repeats and alleges all of the matters set forth in paragraph I of the first answer and defense above and incorporates them herein by reference the same as though fully set forth at length. If plaintiff were injured in the manner set forth in the complaint, defendant is informed and believes, and upon such ground alleges, that plaintiff was negligent in the premises and in those matters set forth in the complaint, and negligently conducted himself on and about and in respect of said switch engine with the result that he was injured. Said conduct of plaintiff, as aforesaid proximately caused and contributed to the said accident, injuries and damages, if any, alleged by plaintiff.

And for a Third, Separate and Independent Answer and Defense to the complaint, and to each alleged cause of action thereof, defendant shows as follows:

I.

Defendant here repeats and alleges all of the matters set forth in paragraph I of the first answer and defense above and incorporates them herein by reference the same as though fully set forth at length. If plaintiff were injured in the manner set forth in the complaint, defendant is informed and believes, and upon such ground alleges, that plaintiff was negligent in the premises and in those matters set forth in the complaint, and negligently conducted himself on and about and in respect of said locomotive with the result that he was injured. Said conduct of plaintiff, as aforesaid, was the sole cause and the sole proximate cause of said accident, injuries and damages, if any, alleged by plaintiff.

Wherefore, defendant Southern Pacific Company, a corporation, prays that plaintiff take nothing by his complaint on file herein; that it have judgment for its costs of suit incurred herein; and for such other, further and different relief, as the premises considered, is proper.

/s/ A. B. DUNNE,

DUNNE, DUNNE & PHELPS,  
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed December 13, 1950.

[Title of District Court and Cause.]

DEMAND FOR JURY TRIAL

To Defendant Above Named and to Messrs. Dunne,  
Dunne & Phelps, Its Attorneys:

You and Each of You, Will Please Take Notice  
that plaintiff hereby demands a trial by jury in the  
above-entitled action.

Dated December 14, 1950.

RYAN & RYAN,

By /s/ DANIEL V. RYAN,  
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed December 15, 1950.

---

[Title of District Court and Cause.]

MOTION FOR ORDER PERMITTING DE-  
FENDANT TO AMEND ANSWER TO  
COMPLAINT

Comes Now, Defendant Southern Pacific Com-  
pany, a corporation, the defendant above named,  
and moves the above-entitled Court for an order  
permitting it to amend the answer to the complaint  
in the above-entitled matter, heretofore served and  
filed on December 13, 1950, in the following par-  
ticulars:

The words "employed by defendant" appearing

on line 29 of page 1 of said answer shall be deleted.

Said motion for an order permitting an amendment to defendant's answer to the complaint is made pursuant to Rule 15, of the Federal Rules of Civil Procedure.

Said motion is based upon all the records, papers, files and proceedings herein, and upon the affidavit of R. Mitchell S. Boyd, filed herewith, a true copy of which is attached hereto.

Dated May 14, 1951.

/s/ A. B. DUNNE,

DUNNE, DUNNE & PHELPS.

#### NOTICE OF MOTION

To Plaintiff Above Named and to Messrs. Ryan & Ryan, His Attorneys:

You, and Each of You, Will Please Take Notice That the undersigned will bring the foregoing motion on for hearing before the above-entitled Court, division of the Honorable George B. Harris, a judge of said Court, or such other division of said Court to which this matter may be regularly assigned, in the courtroom of said Court and division, room 276, in the United States Post Office Building, Seventh and Mission Streets, in the City and County of San Francisco, State of California, on Monday,

May 21, 1951, at 10:00 a.m. of said day, or as soon thereafter as counsel can be heard.

Dated May 14, 1951.

/s/ A. B. DUNNE,

DUNNE, DUNNE & PHELPS.

Memorandum of Authorities

Federal Rules of Civil Procedure, Rule 15.

Respectfully submitted,

/s/ A. B. DUNNE,

DUNNE, DUNNE & PHELPS.

---

[Title of District Court and Cause.]

AFFIDAVIT OF R. MITCHELL S. BOYD

State of California,

City and County of San Francisco—ss.

R. Mitchell S. Boyd, being first duly sworn, deposes and says:

I am an attorney at law licensed to practice before all the courts of the State of California and the above-entitled court. I am associated in the practice of law with the firm of Dunne, Dunne & Phelps, and one of the attorneys for defendant Southern Pacific Company in the above-entitled action. I am personally familiar with all the records, pleadings and proceedings in the said action and the facts as reported by said defendant.



On Wednesday, May 2, 1951, pursuant to stipulation of counsel, I personally took the deposition of plaintiff in the above-entitled action. The testimony of plaintiff upon the taking of said deposition revealed that plaintiff was not employed by defendant Southern Pacific Company at the time of the accident alleged in the complaint, or, at least, that the question of whether plaintiff was employed by defendant at the time of said accident is, and will be at the trial of said action, a disputed question of law and fact. The facts in said testimony concerning plaintiff's occupational relationship with defendant were not known prior to the taking of said deposition and were not known at the time of the preparation, service and filing of the answer to the complaint in the above-entitled action.

Wherefore, it is respectfully prayed that the motion of defendant Southern Pacific Company be granted.

/s/ R. MITCHELL S. BOYD.

Subscribed and sworn to before me this 14th day of May, 1951.

[Seal]                      HAZEL E. THOMPSON,  
Notary Public in and for the City and County of  
San Francisco, State of California.

[Title of District Court and Cause.]

ORDER PERMITTING AMENDMENT TO  
ANSWER TO COMPLAINT

The motion of Southern Pacific Company, a corporation, the defendant above named, for an order permitting an amendment to the answer of said defendant to the complaint in the above-entitled action, came on duly and regularly to be heard before the above-entitled Court, Honorable George B. Harris, the judge of said Court, presiding, on Monday, May . . . ., 1951. Plaintiff and the moving defendant appeared by their respective attorneys. The matter was presented to the Court and was argued by counsel for the respective parties and submitted. And now, the matter having been considered by the Court, the Court having been advised, it is

Ordered that the said motion of defendant be, and the same is hereby granted and the defendant Southern Pacific Company is permitted to amend its answer to the complaint on file herein in the following particulars:

The words "employed by defendant" appearing on page 1, line 29, of the answer filed by defendant Southern Pacific Company to the complaint on file herein shall be deleted.

Done in open court, this . . . . day of May, 1951.

.....,

A. B. Dunne,

.....,

Dunne, Dunne & Phelps.

.....,

United States District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed May 15, 1951.

—

[Title of District Court and Cause.]

**AFFIDAVIT OF DANIEL V. RYAN IN OP-  
POSITION TO DEFENDANT'S MOTION  
TO AMEND ANSWER**

State of California,

City and County of San Francisco—ss.

Daniel V. Ryan, being first duly sworn, deposes and says: That I am an attorney at law licensed to practice before all courts in the State of California and the above-entitled Court in this action; that I am one of the attorneys for the Plaintiff in the above-entitled action; that on Wednesday, May 2, 1951, I was present at the deposition of the Plaintiff in the above-entitled matter; that the testimony of the Plaintiff, upon the taking of said deposition, revealed that Plaintiff was employed by the Defendant as a student fireman at the time of the

accident mentioned in said complaint and was subject to the orders of the Defendant and did work assigned to him by the Defendant, which work was for the benefit of the said Defendant, and further obeyed the orders of said Defendant.

/s/ DANIEL V. RYAN.

Subscribed and sworn to before me this 21st day of May, 1951.

[Seal]     /s/ MEREDITH C. BRIDWELL,  
Notary Public in and for the City and County of  
San Francisco, State of California.

My commission expires Dec. 7, 1953.

[Endorsed]:    Filed May 29, 1951.

---

[Title of District Court and Cause.]

**DENIAL OF MOTION FOR ORDER PERMIT-  
TING AMENDMENT TO ANSWER TO  
COMPLAINT, WITHOUT PREJUDICE TO  
RENEW MOTION AT TIME OF TRIAL**

The motion of Southern Pacific Company, a corporation, the defendant above named, for an order permitting an amendment to the answer of said defendant to the complaint in the above-entitled action, came on duly and regularly to be heard before the above-entitled Court, Honorable Murphy, a judge of said Court, on Monday, May 21, 1951. Plaintiff and the moving defendant appeared by

their respective attorneys. The matter was presented to the Court and was argued by counsel for the respective parties. And now, the matter having been submitted by the Court, the Court having been advised, it is

Ordered that the said motion of defendant be, the same is hereby denied without prejudice to defendant Southern Pacific Company to renew the said motion at the time of trial of the said action.

Dated May 28th, 1951.

/s/ EDWARD P. MURPHY,  
Judge United States District  
Court.

[Endorsed]: Filed May 28, 1951.

---

[Title of District Court and Cause.]

**MOTION FOR ORDER PERMITTING DE-  
FENDANT TO AMEND ANSWER TO  
COMPLAINT**

Comes Now, Southern Pacific Company, a corporation, the defendant above named, moves the above-entitled court for an order permitting it to amend the answer to the complaint in the above-entitled matter, heretofore served and filed on December 13, 1950, in that the additional defenses of the assumption of risk, injuries and release of defendant from claims for injuries may be added to and set forth in the answer of defendant.



This motion for an order permitting amendment to defendant's answer to the complaint is made pursuant to Rule 15 of the Federal Rules of Civil Procedure.

This motion is based upon all the records, papers, files and proceedings herein, and upon the affidavit of R. Mitchell S. Boyd, filed herewith, true copy of which is attached hereto.

Dated June 20, 1951.

/s/ A. B. DUNNE,

DUNNE, DUNNE & PHELPS,  
Attorneys for Defendant.

#### NOTICE OF MOTION

To Plaintiff Above Named and to Messrs. Ryan & Ryan, His Attorneys:

You, and Each of You, Will Please Take Notice That the undersigned will bring the foregoing motion on for hearing before the above-entitled Court, Division of the Honorable Edward P. Murphy, a judge of said Court, or such other Division of said Court to which this matter may be regularly assigned, in the courtroom of said Court and Division, Room 305, in the United States Post Office Building, Seventh and Mission Streets, in the City and County of San Francisco, State of California, on

Monday, June 25, 1951, at 10:00 a.m. of said day or as soon thereafter as counsel can be heard.

Dated June 20, 1951.

/s/ A. B. DUNNE,

DUNNE, DUNNE & PHELPS,  
Attorneys for Defendant.

### MEMORANDUM OF AUTHORITIES

Federal Rules of Civil Procedure, Rule 15.

Respectfully submitted,

/s/ A. B. DUNNE,

DUNNE, DUNNE & PHELPS,  
Attorneys for Defendant.

[Title of District Court and Cause.]

### AFFIDAVIT OF R. MITCHELL S. BOYD

State of California,

City and County of San Francisco—ss.

R. Mitchell S. Boyd, being first duly sworn, deposes and says:

I am an attorney at law, licensed to practice before all the courts of the State of California and the above-entitled Court. I am associated in the practice of law with the firm of Dunne, Dunne & Phelps, and am one of the attorneys for defendant Southern Pacific Company in the above-entitled action.

I am personally familiar with all the records, pleadings and proceedings in the said action and the facts as reported by said defendant.

On Wednesday, May 2, 1951, pursuant to stipulation of counsel, I personally took the deposition of plaintiff in the above-entitled action. Testimony of plaintiff upon the taking of said deposition revealed that plaintiff was not employed by defendant Southern Pacific Company at the time of the accident alleged in the complaint, or, at least, that the question of whether plaintiff was employed by defendant at the time of said accident is, and will be at the trial of said action, a disputed question of law and fact. These facts, first revealed to defendant at the time of taking of the deposition, caused defendant to make a further investigation of the circumstances concerning the accident alleged in the complaint, and, as a result of said investigation, defendant discovered that, because plaintiff was not an employee of defendant at the time of the alleged accident, plaintiff had expressly and impliedly assumed the risk of any injuries sustained while on the premises of defendant and had expressly released defendant from any claims for personal injuries sustained while on said premises. The facts revealed by the testimony in said deposition and the investigation following said deposition concerning plaintiff's occupational relationship with defendant were not known prior to the taking of said deposition and were not known at the time of the preparation, service and filing of the answer to the complaint in the above-entitled action.

Wherefore, it is respectfully prayed that the motion of defendant Southern Pacific Company be granted.

/s/ R. MITCHELL S. BOYD.

Subscribed and sworn to before me this 20th day of June, 1951.

[Seal]                      HAZEL E. THOMPSON,  
Notary Public in and for the City and County of  
San Francisco, State of California.

[Title of District Court and Cause.]

ORDER PERMITTING AMENDMENT TO  
ANSWER TO COMPLAINT

The motion of Southern Pacific Company, a corporation, the defendant above named, for an order permitting an amendment to the answer of said defendant to the complaint in the above-entitled action, came on duly and regularly to be heard before the above-entitled Court, Honorable Edward P. Murphy, a judge of said court, presiding, on Monday, . . . . ., 1951. Plaintiff and the moving defendant appeared by their respective attorneys. The matter was presented to the court and was argued by counsel for the respective parties and was submitted. And now, the matter having been considered by the court, the court having been advised, it is

Ordered that the said motion of defendant be, and the same is hereby, granted, and the defendant



Southern Pacific Company is permitted within five (5) days to amend its answer to the complaint on file herein and to set up additional defenses, including assumption of risk of injuries by the plaintiff and release of the defendant by the plaintiff from claims for personal injuries sustained by the plaintiff.

Dated . . . . ., 1951.

. . . . .  
U. S. District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed June 20, 1951.

---

[Title of District Court and Cause.]

AMENDMENT TO ANSWER

Comes Now, defendant Southern Pacific Company, a corporation, defendant above named, and by leave of Court first obtained, amends its answer herein as follows:

I.

Strikes out the third and fourth sentences of Paragraph I of the first defense, and in place thereof substitutes the following:

On or about the 11th day of August, 1950, between the hours of 10:00 and 11:00 o'clock p.m. on said day, and at the time and on the occasion of the accident referred to in the complaint, plaintiff was on the premises of defendant Southern Pacific Company as a student fireman, at Roseville,



California, agreeably to the provisions of "application for permission to observe operations of locomotives, cars and trains," a copy of which is hereto attached, and at a time and place selected by him for his own convenience and solely for his own benefit and convenience. At the time and on the occasion referred to in the complaint, plaintiff had permission to be with and observe fire lighters, and at the time and on the occasion of his injury was on the engine, as this defendant is informed and believes and therefore avers, solely for the purpose of observing the movement of said engine, and not in the service of this defendant, and was not performing any services for this defendant.

## II.

Adds an additional defense as follows:

For a Fourth and Separate Defense defendant shows:

## I.

Incorporates by reference the averments of paragraph I, as amended, of the first defense. Plaintiff was injured as a result, and solely as a result, of a risk assumed by him.

Wherefore, defendant prays as in its answer on file.

/s/ A. B. DUNNE,

DUNNE, DUNNE & PHELPS,  
Attorneys for Defendant.

Application for Permission to Observe Operations  
of Locomotives, Cars and Trains

Whereas, I, the undersigned, Roger M. Libbey, residing at Citrus Heights in the State of California, and being 27 years of age, have applied to Southern Pacific Company for permission to enter and ride upon the locomotives, trains and cars of said Company for the purpose of observing the operations of the railroad of said Company with the understanding that I shall be under no obligation to perform any work or service upon said railroad until employed by said Company, and that neither said Company nor I shall be under any obligation with respect to my entering the employ of said Company at any time, and

Whereas, said Company is willing to grant my request upon the understanding above expressed, subject to the further condition that I assume all risks of injury which may be sustained by me while upon the premises of said Company or while riding its locomotives, cars or trains,

Now, Therefore, in consideration of said Company granting my said request, I do hereby assume all risks of injury which may be sustained by me while upon or about the property or premises of said Company, and I hereby release and discharge said Company, and the officers and employees thereof, from any and all claims, demands, suits and liabilities of any kind for death or for any injury that I may sustain while upon or about said property or premises.

Signed at Sacramento, State of California, this  
9th day of August, 1950.

/s/ ROGER NORMAN LIBBEY.

Witness:

/s/ M. PALMITER.

[Endorsed]: Filed July 9, 1951.

---

[Title of District Court and Cause.]

INSTRUCTIONS REQUESTED BY  
DEFENDANT

The defendant, for whom the undersigned attorneys appear, requests the Court to give the within instructions, and hereby moves that the same be given on submission of the above-entitled cause to the jury herein.

Dated July 9, 1951.

/s/ A. B. DUNNE,

DUNNE, DUNNE & PHELPS,  
Attorneys for Defendant.

DEFENSE INSTRUCTION No. 22

Even if plaintiff is considered as having been employed by the defendant when he went upon the defendant's premises as a student fireman because he performed service for the defendant, still if you find that under the instructions of the foreman in charge the plaintiff on the shift on which the accident happened was instructed to accompany the fire lighters and learn to light fires and for his own

benefit and convenience and in his own interest and without any instructions from defendant, and not for the purpose of performing any service for the defendant, deviated from the line of activity designated for him on his shift and went upon the locomotive, he then departed from the course and scope of any employment, and if he was injured while he was so in the course of departure, your verdict must be in favor of defendant Southern Pacific Company.

C. & O. Ry. Co. v. Harmon's Adm'r,  
173 Ky. 1, 189 SW 1135.

#### DEFENSE INSTRUCTION No. 23

If you find that in going upon the locomotive the plaintiff did so either on the instructions or at the request of Hostler Petersen, and Petersen did not request him to do so because of any emergency or to perform any service, but solely in order that plaintiff, for his own benefit, might observe the operation of the locomotive, then I instruct you that such direction or request or invitation from Petersen could not and did not obviate or modify or set aside any earlier and contrary instructions, if any, or any other instructions as to what plaintiff should do, given to plaintiff by the foreman in charge, and any such direction or invitation from Petersen was not an instruction to perform service on behalf of the defendant.

[Endorsed]: Filed July 11, 1951.



[Title of District Court and Cause.]

ADDITIONAL INSTRUCTION GIVEN BY  
DEFENDANT

To the Jury:

In response to your inquiry reading: "Are we to take into consideration the fact that false statements were made on the application for employment in determining the settlement," the Court replies as follows: The defense interposed by the defendant based upon alleged false statements made in the application for employment goes to the question of the liability of the defendant. It has no relationship to the matter of damages in the event the jury should decide for the plaintiff.

Approved:

A. B. DUNNE,

Attorney for Defendant.

RYAN & RYAN,

By THOS. C. RYAN,

Attorney for Plaintiff.

[Endorsed]: Filed July 11, 1951.



[Title of District Court and Cause.]

VERDICT

We, the Jury, find in favor of the Plaintiff and assess the damages against the Defendant in the sum of Fifty Thousand (\$50,000.00) Dollars.

/s/ JACK H. DONNER,  
Foreman.

Filed 7-11-51, at 6 o'clock and 7 minutes p.m.

By /s/ EDWARD C. EVENSEN,  
Deputy Clerk.

[Endorsed]: Filed July 11, 1951.

---

In the Southern Division of the United States  
District Court for the Northern District of  
California

No. 30085

ROGER N. LIBBEY,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,

Defendant.

JUDGMENT ON VERDICT

This case having come on regularly for trial on July 9, 1951, before the Court and a Jury of twelve persons duly impaneled and sworn to try

the issues joined herein; Thomas Ryan, Esq., and Daniel Ryan, Esq., appearing as attorneys for the plaintiff, and Arthur Dunne, Esq., appearing as attorney for the defendant, and the trial having been proceeded with on the 9th, 10th, and 11th days of July in said year, and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the Jury and the Jury having subsequently rendered the following verdict, which was ordered recorded, viz: "We, the Jury, find in favor of the Plaintiff and assess the damages against the Defendant in the sum of Fifty Thousand Dollars (\$50,000.00). Jack H. Donner, Foreman," and the Court having ordered that judgment be entered herein in accordance with said verdict and for costs;

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that said plaintiff do have and recover of and from said defendant the sum of Fifty Thousand Dollars (\$50,000.00), together with his costs herein expended taxed at \$74.60.

Dated July 12, 1951.

/s/ C. W. CALBREATH,  
Clerk.

Entered in Civil Docket July 12, 1951.

[Endorsed]: Filed July 12, 1951.

[Title of District Court and Cause.]

## NOTICE OF MOTION FOR NEW TRIAL

To the Plaintiff Above Named and to His Attorneys:

You Are Hereby Notified that on Monday, the 23rd day of July, 1951, at the hour of 10 o'clock a.m. on said day, or as soon thereafter as counsel can be heard, or at such other time as the Court by order may fix, defendant Southern Pacific Company, by its attorneys, will move the above-entitled Court, Department of the Honorable Louis E. Goodman, in the courtroom of said Court and Department in the United States Post Office Building, Seventh and Mission Streets, San Francisco, California, as follows:

### I.

To enter judgment herein in favor of defendant Southern Pacific Company, a corporation, notwithstanding the verdict of the jury herein. Said motion will be made upon the following grounds and each of them:

1. This is an action under the Federal Employers' Liability Act, and there is no evidence that plaintiff herein was an employee of this moving defendant.

2. This is an action under the Federal Employers' Liability Act, and there is no evidence that the plaintiff herein was engaged in interstate commerce within the meaning of this Act, or that any part of any duty of plaintiff was in furtherance of inter-

state or foreign commerce or in any way or directly or closely or substantially affected such commerce.

3. That at the time he was injured plaintiff had departed from the course of any assumed employment with this defendant and was not acting in the course or scope of any assumed employment and had departed from directions given to him as to what he should do on or about the premises and equipment of defendant.

And further said Motion will be made upon the ground that at the conclusion of all the testimony in the case defendant made a motion that a verdict in its favor be directed by the Court, upon the grounds aforesaid, which motion should have been granted but was not granted.

## II.

To vacate and set aside the judgment and verdict herein and grant to this moving defendant a new trial upon the following grounds and each of them:

1. Each of the grounds above specified in support of the motion for judgment notwithstanding the verdict.

2. The verdict is excessive as matter of fact and as matter of law, and as to the amount thereof is not sustained by the evidence, and was given and appears to have been given under the influence of passion and prejudice.

3. The Court erred in its rulings on evidence and in the exclusion of evidence offered by defend-

ant, as more particularly appears from the reporter's transcript of the proceedings of the trial.

4. The Court erred in its instructions to the jury and in the refusal to give instructions requested by defendant, to which refusal defendant duly objected and excepted as more particularly appears from the reporter's transcript of the proceedings upon the trial.

### III.

Said motions will be made upon this Notice of Motion, upon all the records, papers and files herein, and upon the transcript of record, by the Court Reporter, of all of the proceedings upon the trial of this cause.

Dated July 17, 1951.

/s/ A. B. DUNNE,

DUNNE, DUNNE & PHELPS,  
Attorneys for Defendant,  
Southern Pacific Company.

Receipt of copy acknowledged.

[Endorsed]: Filed July 17, 1951.



[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

Upon consideration of the arguments on motion for new trial and after review of the record, I am convinced that the evidence shows that plaintiff was an employee of defendant and that he had not departed from the course of his employment at the time of his injury.

In my opinion, the defense of fraudulent representation in obtaining employment, proximately relating to the injury, was not sustained.

The verdict was for \$50,000 damages. Here again, as in *Southern Pacific Co. v. Guthrie*, 186 F.2d 926, (9 Cir. 1951) cert. denied 341 U.S. 904 (1951), the claim of excessiveness of the verdict is tendered. The verdict was for a larger amount than I would have awarded. But, like *Guthrie*, neither the evidence nor the size of the verdict justifies setting it aside or directing a remittitur.

The motion for a new trial is denied.

Dated July 31, 1951.

/s/ LOUIS E. GOODMAN,  
United States District Judge.

[Endorsed]: Filed August 2, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Southern Pacific Company, a corporation, defendant in the above-entitled action, deeming itself aggrieved by the judgment in the above-entitled action, does hereby appeal to the United States Court of Appeals for the Ninth Circuit, from said judgment and from the whole thereof. The judgment from which said appeal is so taken is the judgment on the verdict of July 11, 1951, herein, and the judgment stamped filed on the 12th day of July, 1951, and entered on July 12, 1951, in Volume VI of the Book of Judgments at page 365 thereof in the office of the Clerk of the above-entitled District Court.

Dated August 3rd, 1951.

/s/ A. B. DUNNE,

DUNNE, DUNNE & PHELPS,  
Attorneys for Defendant and Appellant, Southern  
Pacific Company, a Corporation.

Receipt of copy acknowledged.

[Endorsed]: Filed August 3, 1951.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR JUDGMENT  
NOTWITHSTANDING VERDICT

For the reasons stated in the Court's order denying defendant's motion for new trial, the defendant's motion for judgment notwithstanding the verdict is denied.

Dated August 3, 1951.

/s/ LOUIS E. GOODMAN,  
United States District Judge.

[Endorsed]: Filed August 6, 1951.

---

[Title of District Court and Cause.]

SUPPLEMENTAL NOTICE OF APPEAL

Southern Pacific Company, a corporation, the defendant above named, having filed herein, on August 3, 1951, and after denial by the above-entitled Court on July 31, 1951, of its motion for new trial and after denial by said Court on August 3, 1951, of its motion for judgment notwithstanding the verdict, its Notice of Appeal from the judgment in the above action in favor of plaintiff above named and it appearing from the records of the Clerk of the above-entitled Court that said order of August 3, 1951, denying Southern Pacific Company's judgment for motion notwithstanding the verdict was stamped filed on August 6, 1951,

Now Therefore notice is hereby given that Southern Pacific Company, a corporation, defendant in the above-entitled action, deeming itself aggrieved by the judgment in the above-entitled action, does hereby appeal to the United States Court of Appeals for the Ninth Circuit, from said judgment and from the whole thereof. The judgment from which said appeal is so taken is the judgment on the verdict of July 11, 1951, herein, and the judgment stamped filed on the 12th day of July, 1951, and entered on July 12, 1951, in Volume VI of the Book of Judgments at page 365 thereof in the office of the Clerk of the above-entitled District Court.

Dated August 10, 1951.

/s/ A. B. DUNNE,

DUNNE, DUNNE & PHELPS,  
Attorneys for Defendant and Appellant, Southern  
Pacific Company, a Corporation.

Receipt of copy acknowledged.

[Endorsed]: Filed August 10, 1951.

---

[Title of District Court and Cause.]

### SUPERSEDEAS BOND

Whereas, Southern Pacific Company, a corporation, defendant in the above-entitled action, is about to, or intends to, appeal to the United States Court of Appeals for the Ninth Circuit from the judgment entered in the above-entitled action in the



above-named District Court of the United States on the 12th day of July, 1951, in favor of Roger N. Libbey, plaintiff, and against Southern Pacific Company, a corporation, defendant, for the sum of Fifty Thousand Dollars (\$50,000.00) and costs of suit, and from the whole of said judgment; and

Whereas, said appellant is desirous of staying execution of said judgment so to be appealed from;

Now, Therefore, Indemnity Insurance Company of North America, a corporation duly incorporated under the laws of the State of Pennsylvania, for the purpose of making, guaranteeing, and becoming surety on bonds and undertakings and having complied with all of the requirements of the State of California respecting such corporations, does hereby, in consideration of the premises, undertake and promise, and does hereby acknowledge itself bound, in the sum of Sixty Thousand Dollars (\$60,000), being in excess of the whole amount of the judgment, costs on appeal, interest, and damages for delay, that if the said judgment appealed from, or any part thereof, be affirmed or modified or if the appeal be dismissed, the appellant will pay and satisfy in full the amount directed to be paid by the said judgment, or the part of such amount as to which the judgment shall be affirmed, if affirmed only in part, and all costs, interest and damages which may be awarded against the appellant upon said appeal, and that if appellant does not make such payment within thirty (30) days after the filing of the remittitur from the United States Court of Appeals for the Ninth Circuit, or from such other



court as may and shall lawfully issue the remittitur in the Court from which the appeal is taken, viz., in the United States District Court for the Northern District of California, Southern Division, judgment may be entered in said action on motion of Respondent, Roger N. Libbey, and without notice to said Indemnity Insurance Company of North America, a corporation, in his favor against the undersigned surety for such amount, together with interest that may be due thereon and the damages and costs which may be awarded against said appellant upon such appeal.

In Witness Whereof, the said Indemnity Insurance Company of North America, a corporation, has caused this obligation to be signed by its duly authorized attorney-in-fact and its corporate seal to be thereunto affixed at San Francisco, California, this 3rd day of August, 1951.

[Seal] INDEMNITY INSURANCE COMPANY  
OF NORTH AMERICA,

By /s/ RICHARD W. CATLETT,  
Its Attorney-in-Fact.

Approved:

/s/ LOUIS E. GOODMAN,  
United States District Judge.

Approved as to form August 3, 1951.

RYAN & RYAN,

By /s/ DANIEL V. RYAN,  
Attorneys for Plaintiff.

State of California,

City and County of San Francisco—ss.

On this 3rd day of August in the year one thousand nine hundred and fifty-one, before me, Anna A. Ainslie, a Notary Public in and for the City and County of San Francisco, personally appeared Richard W. Catlett, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the Indemnity Insurance Company of North America, and acknowledged to me that he subscribed the name of the Indemnity Insurance Company of North America thereto as principal, and his own name, as Attorney-in-fact.

[Seal]     /s/ ANNA A. AINSLIE,  
Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Filed August 3, 1951.

---

[Title of District Court and Cause.]

### STIPULATION AND ORDER

It Is Hereby Stipulated between the parties to the above action through their respective counsel that the supersedeas bond filed herein by Southern

Pacific Company, defendant in the above-entitled action, and appellant to the United States Court of Appeals for the Ninth Circuit from the judgment in said action, on August 3, 1951, is sufficient in form and as to time of filing for the purpose of complying with Rule 62(d) and Rule 73 of the Federal Rules of Civil Procedure and for the purpose of perfecting the appeal of Southern Pacific Company from the judgment in said action.

Dated August 17, 1951.

/s/ A. B. DUNNE,

DUNNE, DUNNE & PHELPS,  
Attorneys for Defendant and  
Appellant.

/s/ DANIEL V. RYAN,

RYAN & RYAN,  
Attorneys for Plaintiff.

So Ordered, August 20th, 1951.

/s/ LOUIS E. GOODMAN,  
Judge, U. S. District Court.

[Endorsed]: Filed August 20, 1951.

In the District Court of the United States for the  
Northern District of California, Southern Division

No. 30085

ROGER N. LIBBEY,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,  
tion,

Defendant.

Before: Hon. Louis E. Goodman.

### REPORTER'S TRANSCRIPT

#### Appearances:

For the Plaintiff:

RYAN & RYAN, by  
THOMAS C. RYAN, ESQ., and  
DANIEL V. RYAN, ESQ.

For the Defendant:

DUNNE, DUNNE & PHELPS, by  
ARTHUR B. DUNNE, ESQ.

(A jury being duly impaneled and sworn, the following proceedings were had.)

Monday, July 9, 1951, at 2 P.M.

(Opening statements of both counsel reported but not transcribed.)

(During the presentation of the opening statement by Mr. Ryan a photograph, marked Plaintiff's Exhibit 1, was introduced and filed in evidence.)

Mr. Ryan: Mr. Libbey, will you take the stand?

ROGER NORMAN LIBBEY

plaintiff herein, called as a witness in his own behalf, sworn.

The Clerk: Please state your full name to the Court and to the jury?

A. Roger Norman Libbey.

Direct Examination

By Mr. Ryan:

Q. Where do you live, Mr. Libbey?

A. At 7904 Auburn Boulevard, Citrus Heights, California.

Q. And where is Citrus Heights located?

A. It is about a mile and a half on 99 Highway toward Sacramento from Roseville.

Q. A suburb of Roseville? A. Yes, sir.

Q. All right. Now, are you married or single?

A. I am married, sir.

Q. Is that your wife here in the courtroom? [2\*]

A. Yes, sir.

Q. Have you a family?

Mr. Dunne: That is objected to as immaterial.

Mr. Ryan: Your Honor, I submit that in all these questions on the question of instructions, your Honor instructs the jury all the time regarding

---

\* Page numbering appearing at top of page of original Reporter's Transcript of Record.



(Testimony of Roger Norman Libbey.)

mental suffering and worry, and I believe he has to take care of his family as part of the damages.

Mr. Dunne: We are not responsible for that part of it.

Mr. Ryan: I submit——

The Court: What do you want the witness to tell us, if he has any children?

Mr. Ryan: Yes.

The Court: I will allow him to answer, but I shall tell the jury, of course, they don't make awards for damages on the basis of whether a man has one child or ten children.

Mr. Ryan: That's right.

The Court: If it is offered for the purpose of affecting or engaging the jury's sympathy, they must disregard it.

The Witness: Yes, sir, one baby.

Mr. Ryan: Yes.

The Witness: Boy.

Q. (By Mr. Ryan): What is your age, Mr. Libbey?      A. 27.

Q. What is your birth date? [3]

A. August 24, 1923.

Q. What was the date of your accident that you are now suing for?

A. August 11, 1950, about 10:30 at night.

Q. Then I take it you were just a few days short of your 27th birthday at the time of the accident, is that correct?      A. Yes, sir.

Q. All right. Now, what was the nature of your employment at the time of your accident?

(Testimony of Roger Norman Libbey.)

Mr. Dunne: That is objected to as calling for a conclusion.

The Court: What is the nature?

Mr. Dunne: Nature of your employment. I have no objection to the facts, but I do object to the conclusion.

The Court: Ask him what he was doing at the time.

Q. (By Mr. Ryan): What were you doing at the time of your accident?

A. I was a fire—student fireman.

Q. Student fireman, and by whom were you employed? A. Southern Pacific—

Mr. Dunne: Objected as calling for a conclusion.

The Court: Why don't you avoid the legal technicalities, Mr. Ryan, by asking him to state what took place?

Mr. Ryan: All right.

Q. Let me ask you this: when and where did you first attempt to get a job from the Southern Pacific Company? [4]

A. At the yard office in Roseville.

Q. And what was the date? A. Ninth.

Q. August the 9th? A. Yes, sir.

Q. All right. When you went to the yard office in Roseville on August the 9th, did you speak to anyone connected with the Southern Pacific?

A. I believe his name was Lonergan, the fellow—

Q. Lonergan, L-o-n-e-r-g-a-n? All right. Did you

(Testimony of Roger Norman Libbey.)

tell Mr. Lonergan that you wanted to get a job as a fireman for the Southern Pacific Company?

A. Yes, sir.

Q. All right. When you told that to Mr. Lonergan, what, if anything, did he say to you?

A. He asked me if I was a veteran and if I was married.

Q. He asked you if you were a veteran and what did you tell him in that regard?

A. I told him yes. In other words, he wanted to know if I was of draft age and I told him no, I had already served.

Q. I see. When you told him you were a veteran and that you were married what did he do then or say?

A. He give me a slip of paper to go to Sacramento.

Q. I see. And did you turn that paper in to the man at Sacramento? [5]

A. Yes, sir.

Q. You haven't got that now?

A. No, sir, I haven't.

Q. Do you remember what the paper that Mr. Lonergan gave you to give to the man at Sacramento said?

A. Just to receive me and I was to take a physical examination.

Q. Take a physical examination?

A. Yes, sir.

Q. Did you take a physical examination?

A. Yes, sir, in Sacramento.

Q. And let me take this seriatum. When you

(Testimony of Roger Norman Libbey.)

took that paper to Sacramento—when did you do that, what date?

A. I believe it was the 10th, in the morning, because I went to work at 3:59 shift in the afternoon.

Q. The next day, then? A. Yes, sir.

Q. Then you took this paper to Sacramento?

A. Yes, sir.

Q. And where did you take it in Sacramento?

A. I took it to the main office up above in the station there, S. P. station.

Q. An office at the S. P. station in Sacramento?

A. Yes, sir.

Q. All right. When you went there you were by yourself or were you a member of a group of men? [6]

A. There was a number of young firemen being hired, being hired then.

Q. A number of—

Mr. Dunne: I move to strike that out.

The Court: Yes, that part about being hired will go out. You went with a group of those who wanted to be firemen, is that it?

The Witness: Yes, sir.

Q. (By Mr. Ryan): How many, approximately, were in the group?

A. Oh, about five or six, something like that.

Q. All right. Now, did you hand that paper that Mr. Lonergan gave in Roseville to anyone in Sacramento?



(Testimony of Roger Norman Libbey.)

A. Yes. I don't remember their name. I filled out a paper.

Q. Pardon me? A. I filled out a paper.

Q. Well, who gave you the paper that you filled out?

A. They asked you your past unemployment.

The Court: He wants to know did you go to some office up there on the top floor?

The Witness: Yes, sir.

The Court: What did it say on the door or office?

The Witness: Employment office.

The Court: Someone behind the counter gave you a paper to fill out?

The Witness: Yes, sir. [7]

The Court: Do you know the name of that person?

The Witness: No, I don't. It was a lady.

Q. (By Mr. Ryan): It was what?

A. It was a lady.

Q. A lady? A. Yes, sir.

Q. All right. Now, have you got a copy of that paper she gave you to fill out?

A. No, sir, they kept it.

Q. They kept it?

A. They didn't give me no duplicate copy.

Q. Do you know what questions were asked in that paper and what answers you gave?

A. My age and name and past record for the past ten years and things like that.



(Testimony of Roger Norman Libbey.)

Q. You mean your work record for the past ten years?

A. Yes, age, name, married or single, just the general principles of getting a job.

Q. I see. Is that all?           A. Yes.

Q. All right. When you filled in that paper who did you give it to?

A. The lady kept it and then she sent me over for a physical examination.

Q. Now, where did she send you for a physical examination? [8]

A. I don't remember that, sir.

Q. But where did you go for your physical examination?           A. In Sacramento.

The Court: Some doctor's office?

The Witness: Yes.

Q. (By Mr. Ryan): Do you remember the name of the doctor?

A. No, sir, I don't. It has been a year ago.

Q. But it was a doctor's office in Sacramento, separate and apart from the Southern Pacific Company depot, is that right?           A. Yes, sir.

Q. Now, did you go to that doctor's office by yourself or with others?

A. There was several other fellows there, but I don't know whether firemen or not. I was by myself.

Q. You were by yourself?           A. Yes, sir.

Q. All right. When did you go to this doctor's office?

(Testimony of Roger Norman Libbey.)

A. It was just in the afternoon, about one o'clock on the 10th.

Q. I see, and is that several hours after you had been to the other office? A. Yes, sir.

Q. How long after?

A. Maybe an hour and a half, something like that.

Q. All right. Now, did this doctor give you a physical examination? [9] A. Yes, sir.

Q. Please tell us what he did?

A. He examined my legs and arms.

Q. Were you stripped? A. Yes, sir.

Q. Completely stripped? A. Yes, sir.

Q. All right. Now, he examined your legs and arms, is that right? A. Yes, sir.

Q. Now, let me ask you this: To come right to this point—did you have your left leg injured in the war? A. Yes, sir.

Q. All right. Did the injuries that you received in the war leave scars on your left leg?

A. Yes, sir.

Q. Would you please show us the scars, if you could? I think this is important to bring this out now.

(Witness pulling up pants leg and exhibiting scars.)

Q. (By Mr. Ryan): As far as you can.

A. Didn't show any more.

Q. Now—can your Honor see it? Is that a scar on the outside of your left leg? A. Yes, sir.

(Testimony of Roger Norman Libbey.)

Q. That you got in your war wounds? [10]

A. Yes, sir.

Q. All right. And is this long scar here one connected with the war wound? A. Yes, sir.

Q. What is this scar from?

A. Where they had to go in and take pieces of bone out and split—cut it open and spread it apart.

Q. That was a surgical scar? A. Yes, sir.

Q. And what made this big scar on the side of your leg (indicating)?

A. A small piece went in here and come out over here (indicating).

Q. Small piece of what?

A. Come out here.

Q. Inside your leg? You have a scar that is partly visible, your pants hide it?

A. Yes, sir; it goes up higher.

Q. How long, approximately, is that scar?

A. Oh, about one and a half inches, two inches, something like that.

Q. About one and a half inches showing here (indicating). Is this where you say a piece of shrapnel went in here and came out the other side?

A. Yes, sir. [11]

Q. Did that break the bone? A. Yes, sir.

Q. Now, when you were having your physical examination in Sacramento did the Doctor ask you how you got those scars on your left leg?

A. Yes, sir.

Q. What did you tell the doctor? Please tell the jury.

(Testimony of Roger Norman Libbey.)

A. I told him how it happened. He asked me.

Q. No, you tell us what you told him, the words, as closely as you can remember.

A. He asked me what island I served on.

Q. Did you tell him?

A. Served on Guadalcanal.

Q. You served on Guadalcanal?

A. From August 7, 1942, until October, 1943, is when I got my leg.

Q. You got that injury in October, 1943?

A. While sniping up. [12]

Q. What?

A. While hunting a sniper. He asked me and I told him how it happened.

Q. What happened that you got your leg smashed, specifically?

A. Well, all of a sudden a couple of 81's started cutting loose and couldn't get up to get them.

Q. This is what I mean: Where did the shrapnel come from that went through your leg?

A. Exploded in the air close to us.

Q. By mortar?      A. Yes, sir.

Q. All right. Now, did you tell that to the doctor?      A. Yes, sir.

Q. Did you tell the doctor where the shrapnel went through the thigh bone?

A. He didn't ask me that question.

Q. Did you tell him about how you were treated and how they fixed that up?

A. That is all he asked me, just how it happened; didn't ask me any more that I remember of.

(Testimony of Roger Norman Libbey.)

Q. All right. Did he ask you as to how long you were under medical care for that injury?

A. I don't believe he did. I can't remember.

Q. Now, when you went to this doctor in Sacramento did anybody from the Southern Pacific Company give you a card or a [13] letter to deliver to the doctor, or a piece of paper, or anything like that?

A. I believe they did; they give me an envelope, sealed, to take to the doctor.

Q. Yes?

A. I believe he give me a sealed envelope to take back and to the station.

Q. Pardon me?

A. I believe the doctor give me a sealed envelope to take back to the station.

Q. How long did that physical examination take up there at Sacramento?

A. Just a regular routine examination, approximately, about half an hour, or more.

Q. Did he examine your heart and your lungs——

A. Yes, sir.

Q. ——and your eyes?

A. Everything.

Q. At that time when this doctor examined you, did you have any other scars than these scars on your left leg?

A. Oh, a scar on my head.

Q. Is that the scar right here, indicating on the forehead in the hair line?

A. Yes, sir.

Q. What was it from, shrapnel? [14]

A. Yes, sir.

Q. From Guadalcanal?

A. Yes, sir.



(Testimony of Roger Norman Libbey.)

Q. Did he say he wanted you to tell him about that?

A. I don't remember, it has been so long. He asked me about my leg, I remember that much. I don't think he asked me about my head.

Q. Did you have any other scar on your cheek?

A. Yes, sir.

Q. Was that also from shrapnel?

A. Yes, sir.

Q. And did you tell him about that?

A. I don't think he asked me, only about my leg.

Q. Only about your leg?

A. Only about my legs.

Q. Let me ask you this: After this half hour did that doctor give you anything to take to anyone?

A. I think he gave me an envelope to take back to the station.

Q. All right, when he gave you the envelope what did you do with it?

A. I gave it to the station master. I don't remember his name, right there in Sacramento.

Q. You went back to the main office of the Southern Pacific Company in Sacramento?

A. Yes, sir. [15]

Q. You handed that to the station master?

A. Yes, sir.

Q. What did he say when you handed it to him?

A. Told us to wait around, wanted to give us a lecture on rules and regulations.

Q. Did you wait around for awhile?

(Testimony of Roger Norman Libbey.)

A. Yes, sir, I was—a number of fellows was there, quite a few fellows.

Q. Quite a few fellows. All right. And then finally did someone come and give you a lecture, as you have expressed it? A. Yes, sir.

Q. Who was the man that gave you the lecture?

A. I don't remember his name.

Q. All right. And what did he tell you in regard to the job of being a student fireman, if anything?

A. He told us quite a bit of regulations, just a few of them, you know, about being extremely careful.

Q. Yes?

A. Like not getting on and off a running train, like when—you be sure you don't slip on the tank, just a lot of different things, can't remember—you got a book of regulations here, haven't you?

Q. Gave you several books of rules and regulations, is that correct? A. Yes, sir. [16]

Q. Now, what, if anything, did he tell you in regard to what your duties were when you went to work?

Mr. Dunne: That is objected to as leading and suggestive, calling for a conclusion; no objection to letting the witness tell what happened.

Mr. Ryan: That is what I am trying to get at, but I want to direct his attention to what I am getting——

The Court: Overruled, he may answer.

The Witness: Will you repeat that?

(Question read by the Reporter.)

(Testimony of Roger Norman Libbey.)

A. I was to be a student fireman for two weeks. Then if I qualified I would go on regular pay list.

Q. (By Mr. Ryan): I see. All right. Now, did he tell you where you were supposed to work, what city?

A. Yes, I was supposed to work in the roundhouse at Roseville.

Q. All right. Did he tell you what you were supposed to do when you got to the roundhouse in Roseville?

A. No, he told me to report back to, I believe it was Lonergan, I believe that is his name.

Q. Then did you report back to Lonergan?

A. Yes, sir.

Q. And what did Lonergan tell you?

A. He told me to report to Tim Farrell.

Q. Tim Farrell? A. The foreman. [17]

Q. And did you report to Tim Farrell?

A. Yes, sir.

Q. And what time was it that you reported to Tim Farrell?

A. It was 3:59 on August 10th, 1950.

Q. Now, all this happened on this one day, happened in Sacramento, going to Roseville and going to the roundhouse? A. Yes.

Q. Who was Tim Farrell?

A. Roundhouse foreman. He was the swing shift foreman.

Q. All right. Now, did Lonergan give you any paper or document to hand to Farrell?

A. He gave me two sheets of paper to sign at

(Testimony of Roger Norman Libbey.)

the end of each shift. I signed one of them. I was hurt before I could sign the other one.

Q. Do you know what Lonergan's position is? If you don't know, don't attempt, but if you do know, tell us? A. I don't know, sir.

Q. All right. Now, you say you reported to Tim Farrell, the roundhouse foreman, at 3:59 p.m. on August 10; is that correct? A. Yes, sir.

Q. Now, what, if anything, did Tim Farrell tell you when you reported to him?

A. He told me to keep my eyes and ears open and learn everything I could about being a [18] fireman.

Q. All right. Did he assign you to anyone to show you what you were supposed to do?

A. Well, he told me to, if I could, follow these fire lighters. They were Spanish fellows, and couldn't—hard to understand their language, but I stayed pretty close to them.

Q. To follow the fire lighters?

A. Yes, sir.

Q. You say there were two of them?

A. Yes, Tony and Bob. I don't know their last names.

Q. Tony and Bob. All right. Now, did you follow Tony and Bob around that first day?

A. Yes, sir.

Q. And what did Tony and Bob do?

A. They lit fires, and they lit engines and built up steam.



(Testimony of Roger Norman Libbey.)

Q. Now, when you say Tony and Bob lit fire, did they have to get on board locomotives to do that? A. Yes, they did.

Q. And would you follow them into the cab of the locomotive? A. Yes, sir.

Q. And were these locomotives locomotives that had a fire in them or that were cold?

A. Some were cold and some weren't; some had up a little steam and some didn't.

Q. How would they light the fires?

A. Well, to light a fire first you check your [19] steam, see how much steam pressure is up. Of course, I am a student, I didn't learn much about it.

Q. I understand that, Mr. Libbey.

The Court: What he wants you to say, what did you observe them doing, what did you see them doing?

Q. (By Mr. Ryan): What did you see them doing?

A. I saw them get oil in the fire box, and they light waste, they light it, and have their blower and atomizer adjusted just so, have to have so much water, so much water in the—the water injector, if you inject so much water from the steam—I didn't have much time to learn.

Q. But where would they put this waste material to start the fire?

A. They throw it in the part where—in the fire-box, open the firebox door.

Q. All right, and did they just throw that in, or have a pole to poke into the firebox?



(Testimony of Roger Norman Libbey.)

A. They lit it and tossed——

Q. Pardon me?

A. They lit it and tossed it with their hand.

Q. They lit the waste?           A. Yes, sir.

Q. What would the waste be on?

A. They light one end of the waste, and the firebox door would be open and they heave it in. [20]

Q. Would they light it in their hands?

A. Waste has a little bit of oil on it and doesn't go too fast, light one end of it and have the firebox door open and heave it in there.

Q. All right. Now, how many locomotives did they light the fire on that way on that first day?

A. Oh, let's see.

Q. Approximately, roughly?

A. Oh, eleven or twelve, something like that.

Q. All right. Did you light any of them yourself that first day?           A. No.

Q. Did you have any further conversations with the roundhouse foreman, Tim Farrell, other than the one he told you to keep your eyes and ears open and learn all you could about firing?

A. Well, at the end of the first shift he signed that one paper. We didn't have any conversations, just signed it. I can't remember him saying anything to me.

Q. I show you a document which is entitled, "Authority to pass and instruct student," and then down below it seems to be the signature of an A. F. Farrell. Is that the document he signed at the end of your first day's work?           A. Yes, sir.

(Testimony of Roger Norman Libbey.)

Mr. Ryan: I offer this in evidence, your Honor, as next [21] exhibit.

The Clerk: Plaintiff's Exhibit 2, introduced and filed in evidence.

(Whereupon the document above referred to, marked plaintiff's Exhibit 2, was received in evidence.)

Mr. Ryan: I would like to read that; it isn't very long, your Honor.

The Court: Very well.

Mr. Ryan: Title of this paper is "Authority to Pass and Instruct Student."

"Mr. Roger N. Libbey. Occupation, fireman. August 10, 1950."

And then in printing is the following:

"Please see that . . . . ., student, is thoroughly instructed in the duties of the position named and impress upon him the importance of thoroughly acquainting himself not only with the duties of that position but of any other with which he may be entrusted or to which he may aspire. The necessity for carefulness, courtesy, reliability, loyalty and honesty should be pointed out, as well as the advantages that will accrue from his getting along pleasantly with his fellow workers. At conclusion of student trips with you, please fill out and sign the following report and forward it to my office." [22]

(Testimony of Roger Norman Libbey.)

And then there is a line and title; it is not signed. Then underneath is a form with blocks that are filled in. It says:

“Date, 9/10—”

I suppose they mean 8/10, but it is down here as “9/10, from three to eleven.” Then it says:

“Engine or train, date from . . . to”—it says:

“Opinion as to fitness for position.”

And under that it says:

“Learning.”

And it is signed A. F. Farrell.

Q. Now, did you come to work the next day, August 11, the day of your accident?

A. Yes, sir.

Q. All right. And what shift were you on that day?

A. Same shift.

Q. That is 7:59—I mean 3:59 p.m. to 11:59 p.m.?

A. Yes, sir.

Q. Now, when you came to work on the second day, August 11, did you report to Mr. Farrell again?

A. Yes, sir.

Q. Did you have to present any slip to him this time?

A. No.

Q. All right. When you reported to Farrell on the second day did he say anything to you, or did you just go to work?

A. I just started to work. [23]

Q. All right. Were the same two fire lighters, Tony and Bob, working there that day, too?

(Testimony of Roger Norman Libbey.)

A. Yes, sir.

Q. Did you follow them around that day?

A. Yes, sir.

Q. And what time did the accident happen, by the way?      A. About 10:30.

Q. About 10:30 p.m.?

A. Not approximately, right around there some time.

Q. All right. Say from four o'clock in the afternoon up until 9 o'clock at night, let us take that period, how many fires and how many locomotives did they light?

A. Oh, approximately about the same as the day before.

Q. That is eleven or twelve?

A. About that.

Q. Now, on this second day, did you light any fires?      A. I lit some, yes, sir.

Q. How many fires did you light?

A. About two.

Q. All right. Now, let us get down to the time of your accident. Immediately prior to getting on the locomotive upon which you got hurt, what were you doing?

A. They finished lighting all the fires and everything. The fire lighters told me just to stand around and watch and pick up whatever you can learn, can't help you anymore, we have [24] lit all the fires and the engines are ready.

Mr. Ryan: I didn't get that. May I have it read?

(Testimony of Roger Norman Libbey.)

The Court: Very well.

(Record read.)

Q. (By Mr. Ryan): All right. Now, what happened after that time?

A. I was standing in the corner just looking around, you know, noticing things. Peterson came along.

Q. Who is Mr. Peterson?

A. He was a hostler there.

Q. A hostler. Do you know Peterson?

A. Yes, sir.

Q. What is his first name?

A. I believe it is Don. I never really knew. I always called him Pete.

Q. Mr. Peterson came along and what did he say to you?

A. He was going to move an engine, asked me if I liked to go with him.

Q. Now, where was this engine he was going to move, where was it located?

A. Didn't you say in one? (To Mr. Dunne:) I heard him say it was——

Mr. Dunne: That is right, I did say in one. Don't take it from me, I am not sure.

The Witness: I don't remember. I was hurt so bad and it [25] was dark, I didn't know the place too well.

Mr. Ryan: I didn't get all this.

The Court: He said it was dark and he didn't know the place. You mean you didn't know which roundhouse it was, is that it?



(Testimony of Roger Norman Libbey.)

The Witness: I didn't know which stall. I believe it was stall one, I don't know for sure.

Mr. Ryan: I see.

The Court: Was it in the roundhouse?

The Witness: Was in the roundhouse.

Q. (By Mr. Ryan): Now, those engines that are in the roundhouse, are they in individual stalls?

A. They all have their place, yes.

Q. Yes. And was the engine with the front end of it in towards the roundhouse? A. Yes.

Q. Wall——

A. It was inside the roundhouse.

Q. Were there pits underneath them?

A. Yes.

Q. All right. So we all understand this, do you know how many locomotives that roundhouse will hold? A. I don't.

Q. It is a very long building, with a lot of tracks leading up alongside to a wall, is that right? [26]

A. Yes, sir.

Q. And then when they back out they back out to a round table? A. Turntable.

Q. A turntable, and then you turn the table around and shoot it off whatever track you want to. How far is it, say, from the rear of the tender of the engine you got on back to the turntable?

A. Thirty-five, forty feet, something like that.

Q. Very short distance?

A. It was just a short ways back there.

Q. Now, when Peterson said he was going to move the engine and he said do you want to go with

(Testimony of Roger Norman Libbey.)

me, did he say anything else about what you should do?      A. Not that I remember of.

Q. All right. Now, did you and Peterson both get on this particular engine?      A. Yes.

Q. And where did Peterson go?

A. Well, he was going to be the engineer, the hostler—I mean, he was going to move it.

Q. Did he sit down any place?

A. He sat down in the engineer's seat and I sat down on the fireman's seat.

Q. Now, the engineer sits down on the right-hand side as you [27] look forward to the front of the engine?      A. Yes.

Q. And the fireman's seat is on the left-hand side as you look forward?      A. Yes, sir.

Q. Let me ask you this: Did you do anything during the movement of that locomotive?

A. No, sir, I never touched nothing.

Q. You touched nothing?      A. No.

Q. Were you in a position to see what was going on?      A. Yes, sir.

Q. Were you trying to learn about the movements of the locomotive?

A. Yes, sir, I was watching him.

Q. You were watching Peterson. All right. Now, what did Peterson do when he sat down on the engineer's seat box?

A. He started it in a backward position, started to go backwards.

Q. Yes?      A. Moved the engine backwards.

Q. Did he move any throttles or levers?

(Testimony of Roger Norman Libbey.)

A. I believe the throttle was already set at a——

Q. Did he move any levers or anything of that sort, or did you see that? [28]

A. Well, he moved the—I don't know the things, I mean, nothing about engines very much.

Q. All right.

A. The lever that makes you go backwards, pull it towards you, I learned that much, have to pull it towards you to go backwards.

Q. When he pulled that lever, did the engine begin moving? A. Yes, sir.

Q. All right. Now, please tell his Honor and the Jury what happened then when the thing started moving?

A. Well, there was a tremendous amount of fire, the firebox door was open toward the fireman, and a tremendous amount of fire shot out, started burning my hand and wrist and caught my shirt on fire, my hair started to get on fire, I had, I jumped out, the fire had me blocked to go out the back way, the way you get out of the—the right way to get out.

Q. You say the fire had the way you would normally go out by the ladder, that was blocked off by the fire?

A. Yes, the fire come out like this (indicating) and some of the flames come up in my face and had my shirt on fire. It was pretty hot.

Q. And did you actually get burned?

A. Yes, sir.

Q. And were you treated for burns?

A. Yes, sir. [29]

(Testimony of Roger Norman Libbey.)

Q. All right, and where were you burned?

A. On my arm and knuckles there, still got the scar.

Q. Have you got scars from those burns?

A. Yes, sir.

Q. Will you please stand up so that I might follow this? I think I should take you down a little bit. Careful.

(Witness in front of the jury box.)

Q. (By Mr. Ryan): That white scar you see, is that part of the burns you got that day?

A. Yes, sir.

Q. Step down this way. That white scar, is that it? Is that correct? A. Yes, sir.

Q. Now, you say you also had some burns—for the record, that is the right forearm. Now, did you have any other burns besides that one?

A. Knuckles——

Q. Have you got scars on that?

A. Yes, sir, in here.

Q. You mean this place where the skin is glazed and white?

A. Right in here (indicating the knuckles).

Q. Right in here, one point?

A. Along the knuckles. The whole hand was burned——

Q. The Reporter has to get this down and he didn't hear you. Will you say that again? [30]

A. Well, I was burned here and here (indicating), my whole arm was burned, but not what you



(Testimony of Roger Norman Libbey.)

call bad, didn't leave any scars like it did here and here.

Q. When you say here and here,—

A. That is on my knuckles.

Q. You're describing your knuckles of your right hand?      A. My wrist.

Q. And the wrist?

A. Yes. The skin come off the whole hand, but didn't leave scars.

Q. The skin came off the whole hand?

A. You know how skin peels off when it is burned.

Q. Your right hand?      A. Yes, sir.

Q. All the skin of your right hand came off?

A. You know how it peels off. It came off.

Q. Will you sit down? And you say your shirt was burned, is that correct?      A. Yes, sir.

Q. And what part of your shirt was burned?

A. Well, up around here, around my chest.

Q. Around your chest?      A. My arm.

Q. Indicating your right arm?

A. Yes, sir. [31]

Q. You said something about your hair?

A. My hair was singed. My wife came to see me at the hospital. I didn't know my hair was singed. I lost a lot of blood and pretty sick. I know when I came to just before I went in surgery she said, "Gee, your hair is burned." [31-A]

Q. Now, what did you do when this wall of fire along the fire—whatever you want to call it, blocked



(Testimony of Roger Norman Libbey.)

off your—blocked the way from going down the ladder; what did you do then?

A. I had to jump out or burn up. It was pretty hot.

Q. Was this fire all over the cab or just on your side?

A. Just on my side, because the fire door was open, just propped open with a sand scoop.

Q. Let me ask you about that. I show you Plaintiff's Exhibit No. 1, is that the type of fire door it was?

A. Is that the consolidated type, isn't it?

Q. Now, is that the type that it was?

A. Yes, sir.

Q. Now, are these levers that are shown in the picture, is that on the fireman's side of the engine?

A. Yes, sir.

Q. All right; and is this thing the handle of the door? A. Yes, sir.

Q. And when you open the door, does the open part of the door go towards the engineer or the fireman?

A. Well, the door opens this way (indicating), from the left to the right. In other words, the fire could—couldn't come out his way very easy.

Q. All right.

Mr. Ryan: Your Honor, I would like to pass this to the [32] jury, if I may.

The Court: All right.

(Whereupon counsel passed photographs to the jury.)

(Testimony of Roger Norman Libbey.)

Mr. Ryan: And if it is all right, I will keep on asking him questions.

Q. Now, you say that the way the fire door was open the fire couldn't go over to the engineer's side, is that right?

A. It was propped open about this far with the sand scoop.

Q. Let's see——

A. About like that, something (indicating).

Q. About four or five, five—four or five inches, would you say?

A. Yes, sir, towards me, it opens towards the left, opens this way (indicating).

Q. You say there was also something holding the door open?      A. A sand scoop.

Q. And what kind of an object is a sand scoop, what is that like?

A. It is kind of like a scoop, you know, with a back like this you scoop up—you have seen a scoop.

Q. About how big is that scoop?

A. About this big (indicating).

Q. You're indicating about eight inches, maybe?

A. Maybe a little bit longer.

Q. Eight inches or more longer. You say that was propped [33] in to keep the door open?

A. Yes, sir.

Q. All right. So when the fire came out it just came over in your direction, is that correct?

A. Yes, sir.

Q. When did you discover that about the door being open?

(Testimony of Roger Norman Libbey.)

A. I noticed it was open, but I didn't pay any attention to it, because I figured it was supposed to be that way.

Q. Did anyone ever tell you that the door was not supposed to be open?      A. No, sir.

Q. No one gave you any instructions one way or the other on that?      A. No, sir.

Q. All right. Now, I show you a picture of what appears to be the interior of a locomotive with a sort of a cushion seat a person could sit down on with a foot and back rest behind it and certain levers and a window right next to the seat and an arm rest. Is that a correct and fair representation of the seatbox and the window on the fireman's side of the kind of engine you were on that night?

A. Yes, sir.

Mr. Ryan: I will offer that, your Honor, as our next exhibit.

Mr. Dunne: No objection. I assume it is offered for the [34] purposes of illustration?

Mr. Ryan: Yes, your Honor, my main purpose is to show what the window looks like.

The Clerk: Plaintiff's Exhibit 3 introduced and filed in evidence.

(Whereupon the photograph above referred to, marked Plaintiff's Exhibit 3, was received in evidence.)

Q. (By Mr. Ryan): And then I show you a picture taken from the outside looking at a window

(Testimony of Roger Norman Libbey.)

and does that look, appear to be the type of window that was on the engine that you were hurt on?

A. Yes, sir.

Mr. Ryan: I offer that as our next exhibit, your Honor, and I would like to show those two, if I may, to the jury.

The Court: All right.

The Clerk: Plaintiff's Exhibit 4 introduced and filed in evidence.

(Whereupon the photograph above referred to, marked Plaintiff's Exhibit 4, was introduced and filed in evidence.)

Q. (By Mr. Ryan): Mr. Libbey, how did you go out the window?

A. Well, its kind a hard to remember, it happened so fast, but——

Q. Well, I mean, could you tell us whether you went out feet first? A. Feet first. [35]

Q. Did you climb over the seat and put your legs out?

A. I just made a jump out. I wasn't—I could show you, if I could do it, if I had two good legs to show you, I can't tell you, I just jumped.

Q. You moved so fast?

A. I moved so fast, coming fast, your mind is working as fast as your feet, sometimes, as your actions does.

Q. All right. Where did you land?

A. On the concrete below.

Q. On the concrete below. Do you know what the



(Testimony of Roger Norman Libbey.)

distance is or could you give us an estimate of the distance from the sill of the window to the concrete floor below?

A. I can make a rough guess, I don't know whether it would be right or not.

Q. All right, what is your estimate?

A. I would say eleven and a half to twelve feet, something like that.

Q. And what happened to you when you landed, how did you land, do you know that?

A. I landed with most of my weight on the right leg.

Q. Most of the weight on the right leg.

A. I went backward, laid on my back, my leg folded up at the same time. My leg was in a position like this, (indicating)—it was bent as far as it would go and the femur bone was sticking out about that far, a little over an inch. [36]

Q. It was sticking—were you wearing overalls?

A. No, I was wearing Levis.

Q. You were wearing Levis, and was the bone sticking out making a hole in the Levis?

A. It just barely punctured, but I could tell by the pain, by feeling it.

Q. Right around a few inches above the knee?

A. Right here (indicating).

Q. I see. And what happened then after you fell? Did you lose consciousness?

A. No. First, my leg busted, I didn't notice it until after I was on my—flat on my back, I looked—first my back hit after my leg folded up, back



(Testimony of Roger Norman Libbey.)

of my head hit, flat on my back, I laid there and my leg was in a collapsed position. I tried to pull it back, and then the pain started coming, a dead feeling. I noticed my leg was busted, I could see where the bone had pierced, broken kind of backward, I felt it pierced the pants a little bit and with the blood it was getting pretty wet, the blood was coming, starting to run.

Q. And who was the first one to come to your assistance?

A. Peterson came right away. He was about, one of the first fellows to come there.

Q. I see. How far, if at all, had the engine moved, after you fell?

A. Just a—maybe a couple of feet. He stopped right there [37] and got out. I didn't know he was standing there, because the pain was starting to come.

Q. Now, were you removed to a hospital?

A. I was taken to a little first aid station there and had to call a doctor. They took me, carried me over on a stretcher. It was maybe—they took me to a truck in a stretcher.

Q. Yes.

A. Maybe it was about four or five blocks, something like that, to the first aid station. They took me out of the stretcher when the doctor came and took me in there and put my leg in a splint, straightened it out and gave me a morphine shot and he told me to hold your breath. It was bent like, so he pulled it out and straightened it out.

(Testimony of Roger Norman Libbey.)

Q. Your right leg?

A. Yes, and put it in the splint.

Q. Let me ask you this: How was your left leg before this accident?

A. Well, it——

Q. Were you able to work with it?

A. Yes, I held down jobs.

Q. All right, what job did you have immediately before going to work for the Southern Pacific Company?

A. I worked at McClellan Field.

Q. That is McClellan Field, airfield, Army airfield near Sacramento? [38]

A. Yes, sir.

Q. What did you do at the McClellan Field?

A. I was a mechanic's helper.

Q. Yes, and how long did you act as a mechanic's helper at McClellan Field?

A. May I refer to my notes? I wrote down the date of my deposition and I wrote down—and I can't remember them in my mind very good. Is that all right?

Q. I will ask you that question later. I want to get a point before recess. Let me ask you this: For instance, before this accident, how far could you walk?

A. I could walk five or six or seven miles on the other leg and think nothing of it.

Q. And you actually——

A. I had at times. I had an automobile, but I used to take off walking just for the practice, sometimes.

(Testimony of Roger Norman Libbey.)

of my head hit, flat on my back, I laid there and my leg was in a collapsed position. I tried to pull it back, and then the pain started coming, a dead feeling. I noticed my leg was busted, I could see where the bone had pierced, broken kind of backward, I felt it pierced the pants a little bit and with the blood it was getting pretty wet, the blood was coming, starting to run.

Q. And who was the first one to come to your assistance?

A. Peterson came right away. He was about, one of the first fellows to come there.

Q. I see. How far, if at all, had the engine moved, after you fell?

A. Just a—maybe a couple of feet. He stopped right there [37] and got out. I didn't know he was standing there, because the pain was starting to come.

Q. Now, were you removed to a hospital?

A. I was taken to a little first aid station there and had to call a doctor. They took me, carried me over on a stretcher. It was maybe—they took me to a truck in a stretcher.

Q. Yes.

A. Maybe it was about four or five blocks, something like that, to the first aid station. They took me out of the stretcher when the doctor came and took me in there and put my leg in a splint, straightened it out and gave me a morphine shot and he told me to hold your breath. It was bent like, so he pulled it out and straightened it out.

(Testimony of Roger Norman Libbey.)

Q. Your right leg?

A. Yes, and put it in the splint.

Q. Let me ask you this: How was your left leg before this accident? A. Well, it——

Q. Were you able to work with it?

A. Yes, I held down jobs.

Q. All right, what job did you have immediately before going to work for the Southern Pacific Company? A. I worked at McClellan Field.

Q. That is McClellan Field, airfield, Army airfield near Sacramento? [38]

A. Yes, sir.

Q. What did you do at the McClellan Field?

A. I was a mechanic's helper.

Q. Yes, and how long did you act as a mechanic's helper at McClellan Field?

A. May I refer to my notes? I wrote down the date of my deposition and I wrote down—and I can't remember them in my mind very good. Is that all right?

Q. I will ask you that question later. I want to get a point before recess. Let me ask you this: For instance, before this accident, how far could you walk?

A. I could walk five or six or seven miles on the other leg and think nothing of it.

Q. And you actually——

A. I had at times. I had an automobile, but I used to take off walking just for the practice, sometimes.



(Testimony of Roger Norman Libbey.)

Q. Your left leg was in such a condition you *could* five, six or seven miles? A. Yes.

Mr. Ryan: Your Honor going to take the recess, now?

The Court: We will take the midafternoon recess for ten minutes at this time.

(Short recess.) [39]

Q. (By Mr. Ryan): Mr. Libbey, you called my attention to something during the recess, so I will refer back a moment to that physical examination you got from the Southern Pacific doctor in Sacramento. Do you remember that? A. Yes, sir.

Q. All right. Now in addition to telling him how you got your war wound and showing it to him, can you state whether or not you told him anything in regard to any disability rating that you were getting?

A. I told him I got a disability, yes.

Q. And were you getting a disability rating from the Veterans Administration at that time?

A. Yes, sir.

Q. And how much was that?

A. Ten per cent then.

Q. Did you tell that to the doctor?

A. Yes, sir.

Q. All right. Now before the recess, also, I was going into the type of work you did before going to work for the Southern Pacific Company. Now you told us it was August 9th, 1950, that you made application for a job as a fireman with the S. P.



(Testimony of Roger Norman Libbey.)

What was the last day you worked for McClellan Field as a mechanic's helper?

A. I believe it was in August, August 8th.

Q. August 8th. All right. Now, how long did you work as a [40] mechanic's helper for McClellan Field?

A. I went to work the last part of February of 1950.

Q. Did you work continuously from the last part of February, 1950, up to August 8th, 1950?

A. Yes, sir.

Q. That's a little over five months, is that correct?

A. Yes, sir.

Q. All right. Now, what kind of duties did you do as a mechanic's helper at McClellan Field?

A. I would overhaul Pratt & Whitney engines and Wright Cyclones——

Q. Pratt & Whitney airplane engines?

A. Yes.

Q. And what else?

A. Allison and Curtiss-Wright engines.

Q. Yes; and was that light work or was it heavy physical work?

A. It took quite a bit of strength. You had to stand up all the time, just about, and——

Q. And how many hours a day did you work?

A. Eight hours.

Q. Most of it standing up?

A. Yes, sir.

Q. Handling wrenches?

A. Yes, sir. [41]

Q. Heavy wrenches?

A. Yes, sir.

Q. All right. Now, what did you do—strike that.

(Testimony of Roger Norman Libbey.)

I will put it this way. How far did you get in school?

A. I went to the second year of high school.

Q. Where did you go to high school?

A. Near Fair Oaks, California.

Q. That is, Fair Oaks, up near Sacramento, in Sacramento County?

A. Yes, sir.

Q. Not far from Roseville?

A. Yes, sir. The high school is San Juan, was the name of it.

Q. You went up there two years, went through two years of high school?

A. Yes, sir.

Q. Did you ever graduate from high school?

A. No, sir.

Q. Did you ever have a job as a clerk in your whole life?

A. No, sir.

Q. Did you ever study accounting or clerking?

A. No, sir.

Q. What did you do after finishing—did you finish the second year of high?

A. No, sir, I didn't finish all that year. [42]

Q. What did you do; where did you go from high school?

A. I joined the marine corps in 1941.

Q. What was the date that you joined the marine corps?

A. December.

Q. December what?

A. 12th.

Q. December 12th, 1941; how old were you at that time?

A. I believe I was just eighteen years old.

(Testimony of Roger Norman Libbey.)

Q. All right. Now did you go right from the middle of your second year of high school into the marine corps? A. Yes, sir.

Q. All right. Now how long were you in the marine corps? A. Up until August 18, 1945.

Q. Were you discharged from the marine corps on or about that date, August 18th, '45?

A. Yes, sir.

Q. All right, and what kind of a discharge did you get? A. M.D.—medical discharge.

Q. A medical discharge. At the time of your discharge from the marine corps on August 18th, 1945, were you able to get around without the aid of crutches, or were you still using crutches?

A. I walked on crutches for a little while, then I threw them away.

Q. All right. Now what is the first job you got after getting [43] out of the marine corps?

A. On January, 1946, I went in the Army Transportation Corps under Merchant Marine, what it was.

Q. The Army Transportation Corps; you mean from Fort Mason?

A. Pedro then was our shipping out base.

Q. Was that the United States Army Transport—

A. Well, they had two transportation bases, but I shipped out of Pedro first.

Q. By "Pedro" you mean San Pedro, California? A. Yes, San Pedro, California.

Q. All right. Now what ship did you go out on?

(Testimony of Roger Norman Libbey.)

A. The Sea Barb.

Q. The Sea what?

A. The first one was the Charles A. Stadford, first ship.

Q. Well, let me put it this way. I am not so much interested in the name of the ship; how long were you in the United States Army Transport Service?

A. Up until 1947. May I refer to some notes here?

Mr. Ryan: May he, your Honor? He has a bad memory, and he made some notes.

The Witness: I have the dates on these.

The Court: All right.

Q. (By Mr. Ryan): From your notes, then, please give us the dates that you were in the army, the U. S. Army Transport Service. [44]

A. January, 1946, until the latter part of '47.

Q. The latter part, all right. Now, what job did you hold on board these ships?

A. I was a wiper in the engine room.

Q. Now a wiper in the engine room?

A. Then I was a deck crewman, ordinary seaman.

Q. Ordinary seaman in the deck department.

A. Yes, sir.

Q. All right. Now, what were your duties, generally speaking, as a wiper in the engine room?

A. I worked, I cleaned floor plates and painted boilers and things like that. Didn't monkey with no mechanical works of any kind.



(Testimony of Roger Norman Libbey.)

Q. And as a wiper, can you state whether or not you were required to get into cramped spaces?

A. Yes, sir, we had to paint the deck, floor plates and such as that.

Q. Floor plates behind machinery in the engine room?      A. Yes, sir.

Q. All right. And then, you say part of the time was as an ordinary seaman. What were your duties there?

A. I would chip paint and secure stores, stow away lines and all kinds of things.

Q. All right. Say, incidentally, did you hurt that left leg again while you were in the army transport service? [45]      A. Yes, sir.

Q. And where was that? Where did that occur?

A. I had a small storm off on Inchon, Korea, and I fell from one deck to the next.

Q. When was that?

A. In September — pardon me; in August of 1946.

Q. Of August, 1946. And what injury did you suffer to the left leg?

A. I fractured my knee joint.

Q. Fractured your knee joint?

A. Yes, sir.

Q. And were you hospitalized for that?

A. Yes, sir, I went to the 29th Field Hospital, just out of Seoul, Korea.

Q. That is a United States army hospital near Seoul, Korea?



(Testimony of Roger Norman Libbey.)

A. Yes; it was a Korean, but they made it into an American hospital.

Q. It was an American hospital with American doctors, is that right?

A. American nurses and doctors, yes.

Q. All right, and how long were you in that hospital in Korea?

A. Oh, let's see. I left there in the latter part of '46.

Q. And was your leg in a cast?

A. They took me out of the cast just before I come home. [46]

Q. All right. And did you recover from that injury? A. Yes, sir.

Q. All right, and after you recovered from that injury did you continue working up until the latter part of '47 for the army transport service?

A. Yes.

Q. Now after that knee injury, what job did you hold with the army transport service?

A. I still hold my ordinary seaman's and my wiper's, but I worked out of Fort Mason up until the latter part of that year, down there.

Q. And what type of work did you do at Fort Mason? That is here in San Francisco?

A. Yes.

Q. What type of work did you do there?

A. Oh, I helped unload stores on trucks and supplies and stuff like that.

Q. Doing sort of stevedoring work?

A. Yes, sir.

(Testimony of Roger Norman Libbey.)

Q. All right. Or packing things on board ship?

A. Yes.

Q. Were these heavy crates that you would carry?

A. Yes. We used to load them into nets, and they would hoist them up on the crane into the hold.

Q. Were you able to do that work? [47]

A. Yes, sir.

Q. All right. Now after leaving the army transport service in the latter part of 1947, what was the next job you held?

A. Well, in March I worked for Sacramento Box. I was a laborer, handling lumber.

Q. For Sacramento who?

A. Sacramento Box, in Sacramento.

Q. All right.

A. (Continuing): I worked there March and April of 1948.

Q. And you say you were a laborer?

A. Yes.

Q. What type of work were you required to do there?

A. Handling lumber, loading and unloading box-cars, trucks and things like that.

Q. More or less stevedoring work again?

A. Yes.

Q. I see. And then what did you do?

A. Then I went to a logging camp and pulled green chain, handled green lumber up there.

Q. Where was this lumber company?

A. Pino Grande, above Placerville.

(Testimony of Roger Norman Libbey.)

A. Yes; it was a Korean, but they made it into an American hospital.

Q. It was an American hospital with American doctors, is that right?

A. American nurses and doctors, yes.

Q. All right, and how long were you in that hospital in Korea?

A. Oh, let's see. I left there in the latter part of '46.

Q. And was your leg in a cast?

A. They took me out of the cast just before I come home. [46]

Q. All right. And did you recover from that injury?      A. Yes, sir.

Q. All right, and after you recovered from that injury did you continue working up until the latter part of '47 for the army transport service?

A. Yes.

Q. Now after that knee injury, what job did you hold with the army transport service?

A. I still hold my ordinary seaman's and my wiper's, but I worked out of Fort Mason up until the latter part of that year, down there.

Q. And what type of work did you do at Fort Mason? That is here in San Francisco?

A. Yes.

Q. What type of work did you do there?

A. Oh, I helped unload stores on trucks and supplies and stuff like that.

Q. Doing sort of stevedoring work?

A. Yes, sir.

(Testimony of Roger Norman Libbey.)

Q. All right. Or packing things on board ship?

A. Yes.

Q. Were these heavy crates that you would carry?

A. Yes. We used to load them into nets, and they would hoist them up on the crane into the hold.

Q. Were you able to do that work? [47]

A. Yes, sir.

Q. All right. Now after leaving the army transport service in the latter part of 1947, what was the next job you held?

A. Well, in March I worked for Sacramento Box. I was a laborer, handling lumber.

Q. For Sacramento who?

A. Sacramento Box, in Sacramento.

Q. All right.

A. (Continuing): I worked there March and April of 1948.

Q. And you say you were a laborer?

A. Yes.

Q. What type of work were you required to do there?

A. Handling lumber, loading and unloading box-cars, trucks and things like that.

Q. More or less stevedoring work again?

A. Yes.

Q. I see. And then what did you do?

A. Then I went to a logging camp and pulled green chain, handled green lumber up there.

Q. Where was this lumber company?

A. Pino Grande, above Placerville.

(Testimony of Roger Norman Libbey.)

Q. What is the name of the place?

A. Pino Grande. It is above Placerville. It is a logging camp up there.

Q. And was that laboring work? [48]

A. Yes, sir.

Q. Incidentally, were you hired as a laborer?

A. Yes, sir.

Q. All right, and what did you have to do as a laborer up there?

A. We would handle the green chain.

Q. What? A. Handle green lumber.

Q. Handle green lumber; please tell us what you mean by the term "handling green lumber"; what did you do with it?

A. There is a chain there of lumber of different grades, and you have to take a different size of board and put it in its pile and put a different size in the other pile. It is all green lumber, just after it comes off the saw. It is already cut.

Q. Was this a sawmill? A. Yes.

Q. Oh, I see. And how long did you work at that? A. Let's see. April until June.

Q. April until June of 1947? A. 1948.

Q. What? A. 1948—April until June.

Q. All right. Now without going into all the details, from June 1948, up until the time you went to work for McClellan [49] Field, which was in February of 1950, what did you do in the meantime?

A. Well I—you want the job after I left the last one, don't you?



(Testimony of Roger Norman Libbey.)

Q. No, I don't want the name of each company you worked for, but I mean, please tell us the type of work you did?

A. Just labor work, such as lumber work, saw-mills.

Q. Sawmills. Any other?

A. Sometimes digging ditches when I could get a job.

Q. Digging ditches? A. Stuff like that.

Q. Did you do that very long?

A. Well, there's one place here I worked several months. I worked for a mortuary outfit.

Q. Well, I mean, about digging ditches; how long did you do that?

A. Oh, approximately about three months.

Q. And was that with a pick and shovel?

A. Yes, sir.

Q. Eight hours a day? A. Yes, sir.

Q. And would your left leg, the one that you had the war wound in, would that permit you to carry on that work?

A. No, I used to shovel with it; I mean, I used it for a shovel leg. [50]

Q. I mean, you were able to work even though you had that shell wound? A. Yes, sir.

Q. I see, all right.

My brother said to clarify that work for the mortuary. Is it true that the mortuary job was where you were digging ditches where they were going to build a building?

(Testimony of Roger Norman Libbey.)

A. Yes. No, I wasn't going to build a graveyard; they were just going to build a new place.

Q. All right. Thanks. All right now, let me ask you this. How much money did you earn when you worked for the transport service?

A. About \$300 a month. We got mine bonuses over the 108th Meridian. They paid mine bonuses in different waters we was in.

Q. How much—what was your basic rate of pay or what would it have been had you not been injured as a fireman, locomotive fireman, for the Southern Pacific?

Mr. Dunne: That is objected to as incompetent, irrelevant and immaterial and purely speculative.

Mr. Ryan: I submit to Your Honor that if he hadn't had this accident, presumably he would have been a fireman.

Mr. Dunne: There is no such assumption.

The Court: It is speculative, though. That would require guessing at that. [51]

Mr. Ryan: You mean about his base rate of pay, so much an hour?

The Court: Well, it still would be speculative, because that wasn't what he was doing at the time.

The Witness: I couldn't answer it anyway, because I don't know.

The Court: Well, that solves the question.

Q. (By Mr. Ryan): Getting back a moment to when Peterson told you he was going to take out this locomotive, what was your purpose in getting on that locomotive?

(Testimony of Roger Norman Libbey.)

Mr. Dunne: That is objected to as incompetent, irrelevant and immaterial. Well, I will withdraw the objection; no objection.

A. Well, I figured I could learn something I hadn't learned before.

Q. (By Mr. Ryan): You figured you could learn something about what?

A. About locomotives. I mean, not only my firing, but operating it.

The Court: Well, it is pretty obvious, isn't it, Mr. Ryan?

Mr. Ryan: All right.

Q. (By Mr. Ryan): Now let me ask you this. Were you moved to a hospital in Sacramento?

A. Yes, sir. [52]

Q. What hospital were you moved to?

A. Mercy Hospital.

Q. And how long were you there?

A. I was removed the next day about noon time.

Q. That would be October 12, 1950?

Mr. Dunne: August.

Q. (By Mr. Ryan): I mean August 12th?

A. August 12th.

Q. Thanks. All right. Now, what treatment, if any, did they give you at the Mercy Hospital in Sacramento?

A. Well, they give me some blood plasma.

Q. Blood plasma?

A. And some more morphine. Then they knocked me out and put a body cast on, set my leg and put it in the body cast.

(Testimony of Roger Norman Libbey.)

Q. All of that was done at the Mercy Hospital?

A. Yes, sir, that night.

Q. Yes. And was that a plaster of paris cast that was put on you?      A. Yes, sir.

Q. What portion of your body did it cover?

A. Well, my left leg from the knee to the hip, clear across, and covered this whole leg, foot and all (indicating). A spy cast is what they call it.

Q. Up to your stomach?      A. Yes, sir. [53]

Q. All right. Now you say the next day you were moved, and where were you moved to?

A. The Southern Pacific Hospital here in Frisco.

Q. The Southern Pacific General Hospital in San Francisco?      A. Yes, sir.

Q. All right. Now how long were you at the Southern Pacific General Hospital on the first occasion?

A. Up until October 16th, I think was the date.

Q. October 16th. Now what was done for you when you first got to the Southern Pacific Hospital here?

A. Well, first I was given some more blood.

Q. More blood?

A. Yes. And then they set my right arm, which they thought was fractured. It was swollen pretty bad. They doctored the burns and set my right arm in, not a splint, but just—I guess they call it a splint, just to keep it there until they x-rayed it and found out if it was busted, if it was fractured, which it wasn't.

(Testimony of Roger Norman Libbey.)

Q. You say they treated the burns; how did they treat the burns?

A. Just put salve on my right hand.

Q. And what do they do—did they leave that cast on that they put on at the Mercy Hospital, or did they take that off?

A. Well, I don't remember it exactly. I think it was about the 14th, the date, that they knocked me out again and put me [54] in traction. They removed the cast.

Q. They removed the cast? A. Yes, sir.

Q. And when you say they put you in traction, what did they do?

A. Well, they put a pin through my leg here (indicating).

Q. A pin through your leg?

A. Swung up over an iron contraption and had weights in the back. In other words, they was trying to stretch my leg, pull it in place. That's the only way they set it; they didn't operate it, just pulled it in place until the bones snapped in place, and then put me in a cast.

Q. That pin; was that put through the bone below your knee or above your knee?

A. Below, below my knee.

Q. And did they put, not chains but wires to that?

A. Yes, they had kind of an affair there, I guess—it hooked on the side with wires, a cable attached to it, running——.



(Testimony of Roger Norman Libbey.)

Q. Do you know how much weight they had on this traction?

A. Approximately about thirty-five to thirty-eight pounds, something like that.

Q. Now how long were you in traction?

A. About seven and a half weeks.

Q. And during that seven and a half weeks were you continuously in traction? A. Yes. [55]

Q. They never took off the weights?

A. They couldn't, because the leg would jump back out of place.

Q. When you say the leg was out of place, was there any bowing to it?

A. Now you are asking me some questions, sir, I can't answer, except it was all broke to pieces and they wanted to stretch it back in place. They couldn't operate because I had infection. I had a big hole where the femur bone went through, and it was infected. They had to swab it out every day until it healed.

Q. And——

A. (Continuing): And they couldn't operate.

Q. How long did they have to do that?

A. Pardon?

Q. How long did they have to swab it out every day?

A. They was still doctoring it after I come back home from there in the wheel chair. They took it out of the cast. Well, they doctored up until even

(Testimony of Roger Norman Libbey.)

after the cast was on. They had a little hole cut in the side where they would swab it out every day.

Q. When did they put a cast on at the Southern Pacific Hospital? A. Let's see.

Q. Well, I don't mean the date, but that was after they were through with the traction?

A. After about, eight weeks later, after traction about. [56]

Q. I see. After about seven and a half weeks of traction, then a second cast was put on you; is that correct? A. Yes, sir.

Q. All right. Now what kind of a cast was put on this time?

A. Plaster of paris, the same thing—a spy cast.

Q. A spy?—

A. A spy cast, from this leg up to my waistline, and the whole foot and leg of the right leg.

Q. And you say this leg—you are referring to the left leg from the knee up to your waistline?

A. Yes, sir.

Q. And the right leg, the entire right leg up to your waistline?

A. Yes, sir, the foot and all.

Q. Now were your legs together when you were in that cast or were they spread apart?

A. About like this (indicating with arms).

Q. And about how long did they have that spread cast on you?

A. Oh, all the time until they—they moved—let's see. They had it all the time up until after Christmas, and then they took me out of the cast.

(Testimony of Roger Norman Libbey.)

Q. It was after Christmas of 1950?

A. Yes.

Q. Last Christmas? A. Yes. [57]

Q. And when they took that cast off, did they ever put another one on?

A. Well, they sent me home in a split cast, but I had reported back. See, when I went home on October the 16th, in a wheel chair, got out of bed a few days before that in a wheel chair.

Q. I see. You were sent home in a wheel chair?

A. Yes, sir.

Q. On the train and all?

A. No, I was driven home.

Q. Oh. But did you take the wheel chair home with you?

A. Yes, sir; it was a folding GI chair.

Q. All right. And were you given a leave of absence? A. Yes, sir.

Q. For how long? A. Six weeks.

Q. And during that six weeks leave of absence while you were home, did you have the cast on all the time? A. All the time.

Q. Were your legs still spread?

A. Yes, sir, I laid right in bed.

Q. Were you in bed all the time?

A. Yes, sir.

Q. Were you in bed all the time you had the cast on?

A. Sometimes they lifted me into the wheel chair and taken me [58] outside in the sun and wheeled around.

(Testimony of Roger Norman Libbey.)

Q. I see. All right. Now what happened then after that six weeks leave of absence?

A. Well, about Thanksgiving time, I went back to the hospital. I was driven back by my brother-in-law, and they removed the cast, X-rayed it and said I needed another cast. Put me right back into the plaster of paris and sent me home again.

Q. I see. And how long were you in the hospital on the second time? A. About six days.

Q. All right. Now during that period, did they put the same type of a cast on that they had before?

A. Yes, sir.

Q. Were your legs still spread like you have indicated? A. Yes, sir.

Q. All right, and they sent you home in a wheel chair again? A. Yes, sir.

Q. When you got home, did you have to go to bed or were you able to be up?

A. I had to go to bed right away and I got up maybe a couple of times a day to get some sunlight or something.

Q. And you wore that cast, as you told us before, until after Christmas; is that correct?

A. No—yes, sir.

Q. That is, three casts; are those all the casts that you have [59] had?

A. Well, I had the cast that was put on in Mercy Hospital—

Q. That is one; and one that you had on after you got out of traction would be two?

A. Yes, sir.



(Testimony of Roger Norman Libbey.)

Q. And the one that you had put on while you came, when you came back from your leave of absence would be three. Were there any others?

A. No; after I come back after Christmas, why, they split the cast.

Q. They split the cast? How?

A. And took me out of it, lifted me out of it on the X-ray table, X-rayed it and put me back in the same split cast, taped it together and sent me home.

Q. Oh. And was it the same cast that you had before your legs—with your legs spread out?

A. Yes, it was taped back together.

Q. Yes. And you say that was after Christmas?

A. Yes, sir.

Q. All right. Well then, how long did you remain in the cast after they put you back in it again?

A. Well, he said, he either phoned me or said for me to phone him. So my brother-in-law phoned him. He says we could take off the cast.

The Court: When was that? [60]

The Witness: After Christmas.

Q. (By Mr. Ryan): Well, how long after Christmas?

A. Oh, let's see. About a couple of weeks, something like that.

Q. Couple of weeks, all right. And have you worn a cast since then? A. No, sir.

Q. All right. Now here it is July, 1951. How many times have you been in the Southern Pacific Hospital this year, 1951?



(Testimony of Roger Norman Libbey.)

A. Well, six weeks later I went back for an X-ray.

Q. Well, were you ever at the hospital for any length of time?      A. No, just for an X-ray.

Q. Just for X-rays and check-ups?

A. Yes, sir.

Q. All right, and right at the present time are you under leave of absence from the hospital?

A. Yes, sir.

Q. When was the last time you were in the Southern Pacific Hospital?

A. About two months ago.

Q. How long a leave of absence were you given?

A. Two months.

Q. And were you supposed to be back right now or at the time of the trial? [61]

A. Yes, I was supposed to report there now.

Q. Pardon me?

A. I was supposed to be up there now.

Q. Right now. And you intend to report back after the trial; is that right?      A. Yes, sir.

Q. All right. Now have you ever done any work since this accident?      A. No, sir.

Q. Now let me ask you this: Did you ever suffer much pain following, immediately following the pain, or the accident, rather?      A. Yes, sir.

Q. And where did you have the pain?

A. Right in my femur, and in my knee (indicating).

Q. And are you talking about your right leg?

(Testimony of Roger Norman Libbey.)

A. Yes, sir, and in my back, in back of my head and in my back here (indicating).

Q. What part—you are pointing to your low back? A. Right across here (indicating).

Q. Below the belt line or above it?

A. Right just above the belt line.

Q. All right. Now let me take the pain in your right leg. You say pain in your femur; now what part of your femur or thighbone? [62]

A. Right where it was busted, around the area it is kind of hard, kind of dead-like, where the bone went through the flesh.

Q. Have you got scars there? May I see that, please, if I could?

(Witness raised pants leg on right leg and exhibited scars to jury.)

Mr. Ryan (Continuing): Now I point out these two holes you see here. What made those scars?

A. The pin, where the pin went through.

Q. That is where the pin went through, and then what is this scar on the outer side of your right leg just above the knee?

A. That is where the bone went through.

Q. That is where the bone went through. Now when you say—do you have any pain there today?

A. It hurts right around here.

Q. And by “around here,” you are indicating around the scar where the bone broke through?

A. And in my knee right here it hurts quite a bit in here (indicating).

(Testimony of Roger Norman Libbey.)

Q. And does that pain come and go, or is it constant?

A. Well, it aches, oh, when the weather changes, when it gets cold it aches more. But it aches like when I sit here, the leg kind of gets stiff.

Q. Is your leg stiff?

A. Oh, it won't bend but about like that (indicating).

Q. Is that all you can bend your knee up towards your buttocks? [63]

A. That is forcing it.

Q. That is forcing; does it hurt when you do that? A. Right in here (indicating).

Q. All right. Now how about the strength of that leg? Have you got any strength in it?

A. What do you mean?

Q. Well, I mean, can you walk—how far can you walk today? You used to walk seven miles before the accident? A. Not very far.

Q. About how far could you walk, a couple of blocks?

A. A couple of blocks. I get pretty tired at the end of two blocks.

Q. Have you ever walked an awful lot more than that, or more than that at all? A. No.

Q. Since the accident?

A. That is the most I have tried to walk.

Q. Did you have to use crutches when you first got rid of the casts? A. Yes, sir.

Q. How long did you use crutches?

A. I got off crutches in the latter part of March.

(Testimony of Roger Norman Libbey.)

Q. Latter part of March? A. Yes.

Q. And after discarding the crutches, did you ever have to [64] use a cane? A. Yes, sir.

Q. I notice you don't use a cane today, do you?

A. No.

Q. When did you discard the cane?

A. Oh, about the last time I was down at the hospital, the doctor told me to try my best to walk without it.

Q. And have you been doing that or trying to do that?

A. Yes, I walk with it once in a while, like, if I am downtown or if I am walking, you know, to go to a show or something like that.

Q. Who was your chief doctor at the S. P. Hospital? A. McRae and Dr. Flynn, Dr. Shortes.

Q. Who? A. Dr. Shortes.

Q. Dr. Shortes? A. Yes.

Q. All right. Now let me ask you this: Do you walk with any limp?

A. Yes, this leg is shorter than the other leg.

Q. Have you done anything to try to compensate for the shortness of the right leg?

A. I had my heel built up by——

Q. You had—I see. You had that heel built up?

A. It is not tall enough yet. [65]

Q. It isn't?

A. (Shaking head in the negative.)

Q. Now can I see the other heel? (Examining.)  
I see.

(Testimony of Roger Norman Libbey.)

Mr. Ryan: With your Honor's permission, would you show how you can walk?

The Court: Well, of course he has already done that in coming to the stand.

Mr. Ryan: Thank you. That's correct, your Honor.

Q. (By Mr. Ryan): Let me ask you this. Could you do this? Could you walk up a flight of stairs with one leg after the other on stairs (indicating)?

A. No.

Q. How do you climb up a flight of stairs?

A. Well, put one leg ahead of the other one.

Q. Do you have to start with any particular leg?

A. Well, I start with my left leg, most of the time, because it is stronger.

Q. Is that the reason you start with the left leg, because it is stronger?

A. It is stronger. I mean, I might fall down otherwise.

Q. Have you ever fallen down through the weakness of your right leg?

A. A couple of times my leg give out on me.

Q. What were you doing at the time?

A. Oh, you know how a weak joint is; sometimes it just gives [66] out on you.

Q. I see. Have you ever tried to do any work around the house?      A. No.

Q. Don't help your wife?

A. I have sat down and peeled spuds and things like that and helped her.



(Testimony of Roger Norman Libbey.)

Q. Helped your wife cook. Now do you wash dishes for her?

A. Sit down when I wash dishes for her.

Q. Are you able to stand for any length of time?

A. Not for any length of time.

Q. How long can you stand?

A. A few minutes at a time.

Q. A few minutes. You mean less than five minutes?

A. Yes. You see, the leg has got a bow in it like that, and it won't straighten out. You see, like the other leg is straightened out, it won't straighten out. In other words, I have to—if I don't raise my foot up like this, if I put it clear down like this, it throws my hips off (indicating). I can't stand erect unless I just stand on this leg and hold this leg up.

Q. When you walk, as far as your left leg is concerned, do you have to walk on the ball of your foot or on your toes?

A. Yes, sir.

Q. Why is that?

A. Well, it is shorter than the other leg. I have to walk [67] like that or else my hips would be—I wouldn't be level. It throws this hip back like that.

Q. And does that throw you off balance in walking?

A. Yes, sir.

Q. Now I want to ask you about that bowing. You have indicated on your right leg that bowing, and by "bowing," do you mean that the thighbone, instead of being straight, goes out in the shape of a bow, like a bow and arrow?

(Testimony of Roger Norman Libbey.)

A. That—it tips like that (indicating). You can see, when this is straight, it tips off like that. See, this is straight here, and it tips.

Q. All right. Now in recent months, take the last four or five months, has there been any improvement in that bowing condition? I mean, has it gotten any straighter?

A. No. The bone is healed, the doctors told me, well, at the S. P., several doctors told me that it was just such a bad fracture, that it is the way it would have to be healed. They couldn't set it no better.

Q. I see. Oh, yes. What is the condition of your back? You mentioned something about pain in your back?

A. Well, when I straighten up a lot, like that, it hurts right across here (indicating).

Q. When you straighten up?

A. Yes, sir.

Q. Does it hurt you when you bend away [68] over?

A. If I bend over, it does, right across here (indicating).

Q. All right. Now is that a constant pain or does that come and go?

A. Oh, only if I straighten up like that, it hurts through here. And if I bend over, it hurts through there.

Q. Did you have that before this accident?

A. No, sir.

(Testimony of Roger Norman Libbey.)

Q. Can you sit for any length of time without discomfort? I notice you have been on the stand for almost half an hour or so.

A. Well, my legs get stiff. It gets kind of stiff, and I keep shifting around like this (indicating).

Q. That helps you, helps you, shifting around?

A. Helps me, yes.

Q. Can you shift—can you sit long without shifting around? A. No.

Q. What happens? What do you feel?

A. This leg seems to get real stiff, like, and all the feeling goes out. The feeling goes out of my toes, gets kind of stiff-like.

Q. You say you have a place in your, or your toes, rather, where there is no feeling?

A. They get kind of stiff, kind of cold. Ever hit your elbow and it went dead or you put your hand in a certain position, it kind of goes dead. [69]

Q. Well, is that condition one that exists all the time, or just when you sit too long?

A. Just when I sit in a certain position or a certain length of time.

Q. How about the feeling of your leg? Is there any change in that?

A. It feels dead right around this area, and if I lay my hand on it, it hurts.

Q. It hurts?

A. If I force it—I can straighten it out like that, and you can feel it right here. It hurts right in the knee quite a bit.

(Testimony of Roger Norman Libbey.)

Q. All right. And what has been your condition as far as nervousness is concerned, or lack of nervousness?

A. Been pretty nervous ever since. Even my wife told me the other day, I was a lot more nervous ever since the accident than I was afore.

Q. Well, how were you after you had that war wound and when you got back to the States, when you got out of the hospital?

A. I was nervous for a while, but after I come back from the Army Transport, I seemed to be all settled.

Q. And then your old nervousness came back again?

A. (Nodding head in the affirmative.)

Q. All right. How much were you earning as a mechanics' helper at McClellan Field? [70]

A. \$1.28 an hour.

Q. And how many hours a day did you work?

A. Eight hours.

Q. How many hours a week?

A. Sometimes we would get a little overtime on Saturdays, mostly five days; sometimes I worked five and a half, six days.

Q. And what did you get for overtime?

A. Time and a half.

Q. When you were giving up the job at McClellan Field to get the job as a fireman for the Southern Pacific, locomotive fireman, did that pay more money?      A. Yes.



(Testimony of Roger Norman Libbey.)

Mr. Dunne: That is objected to as incompetent, irrelevant and immaterial.

Mr. Ryan: Well, your Honor, I want to show that he had a right to advance himself if he can, and whether or not he is trying to seek advancement.

The Court: That is speculative, Mr. Ryan.

Q. (By Mr. Ryan): Well, anyway, you left the Field and tried to go with the Southern Pacific?

A. So I could make more money.

Q. Pardon me? What did you say?

The Court: Well, he has already answered that, Mr. Ryan.

The Witness: I thought I could make more money. I mean, I couldn't hardly support my family with the money I was making. [71]

The Court: What did you average at McClellan Field?

The Witness: About \$190 a month. That's all. You can't hardly live with that. We had a baby was due, and I had to pay the hospital bill, and it kind of worried me.

Mr. Ryan: All right, that's all.

#### Cross-Examination

By Mr. Dunne:

Q. Mr. Libbey, you were wounded during the war in the latter part of 1945, is that correct?

A. '43.

Q. '43. And you were sent then to a Marine or Army or Navy Hospital?

A. Yes, sir.



(Testimony of Roger Norman Libbey.)

Q. Where was that? A. New Zealand.

Q. How long were you in that hospital?

A. I came back around Christmas time of '44.

Q. And were there, from some time in '43 then, until the latter part of 1944? A. Yes, sir.

Q. And were not discharged thereafter until some time in 1945, is that correct?

A. Yes, sir.

Q. Now taking that as one time in the hospital; now, then, at some later time that you gave us, you went to sea to do some work at sea? [72]

A. Yes, sir.

Q. And you injured that same left leg that had been wounded? A. Yes, sir.

Q. You injured it by fracturing the kneecap?

A. Yes, sir.

Q. And you were then in the hospital the second time? A. Yes, sir.

Q. Now after you were discharged from the hospital that time and you gave us the date and I have forgotten it, about when was that? In '47, was it? The latter part of '47? A. No, it was in '48.

Q. '48? A. Yes, sir.

Q. Now from that time, the latter part of 1946, up until the time of this accident, at Roseville, in the Southern Pacific roundhouse there, in August of 1950, *were* in the hospital again?

A. I had an automobile accident and I had my left arm fractured. I have the date down here.

Q. Will you give us that, please?

(Testimony of Roger Norman Libbey.)

A. Let's see. It was about the last part of August, 1949.

Q. And how long were you in the hospital that time?

A. Approximately about six weeks, something like that.

Q. What hospital was that?

A. Oak Knoll. [73]

Q. That is the Navy hospital over at Oak Knoll?

A. Yes, sir.

Q. That injury was what, a fractured arm?

A. My left forearm, or I guess what you would call it.

Q. May I see the notes that you are using?

A. Yes, sir. (Producing.)

Q. Did you make up this set of notes, Mr.—

A. During the deposition.

Q. That is, earlier this year your deposition was taken? A. Yes, sir.

Q. And in getting ready for it, you made up this set of notes?

A. No, at the time the deposition was taken, I couldn't remember everything and I just took down some notes so I could remember the dates, different things.

Q. Well, didn't you have this with you at the time the deposition was taken? A. Yes, sir.

Q. So it was before the deposition you made this up? A. Yes, sir.

Q. And you made it up so that when your deposition was taken, you could use it then?

(Testimony of Roger Norman Libbey.)

A. Yes, sir.

Q. And when your deposition was taken, you did use it then, didn't you?

A. Yes, sir, I did. [74]

Q. I say that because on your deposition there is a reference to it, and I want to know if this is the same paper you had then? A. Yes, sir.

Q. So that you were out of work on account of your broken left arm from August 31, 1948, until February of 1949, isn't that correct?

A. Yes, sir.

Q. Then you were mistaken when you spoke of your broken arm?

A. Well, we all make mistakes on dates.

Q. Well, I understand, but we want to get it straight now. A. Yes, sir.

Q. Because it was my recollection, when I was asking you about that a few minutes ago, you said that that was in August or some time in the latter part of 1949.

A. It was in August, '48, when I had my arm busted.

Q. And you were out of work on that account then, up until February of 1949? A. Yes, sir.

Q. I will give these back to you now.

A. Thank you.

Q. I just have one or two questions for you before we suspend at four o'clock.

The Court: Well, I don't want to hurry you at all, but, you have quite a few questions? [75]

(Testimony of Roger Norman Libbey.)

Mr. Dunne: Well, I won't finish with him this afternoon, your Honor.

The Court: Well, suppose we run along a little longer, because that sometimes helps to speed the case up a little bit.

Q. (By Mr. Dunne): Well, you correct me if I am wrong, then. So far as being in the hospital is concerned, then, after you first went into the Marines, you were wounded at Guadalcanal and you were in the hospital then? A. Yes, sir.

Q. Then you went to sea and you were hurt and in the hospital then for that second time?

A. Yes, sir.

Q. Then in August, the 31st of August of 1948, you were in an automobile accident?

A. Yes, sir.

Q. And you got your left wrist broken and were in the hospital then a third time? A. Yes, sir.

Q. Now between that time, when you were in the hospital for your wrist, and the time you were hurt up at Roseville, were you in the hospital again?

A. No, sir.

Q. Now in 1945 when you were discharged from the Navy or the Marine Corps, rather, at that time you were given a medical discharge, were you [76] not? A. Yes, sir.

Q. And you were given a disability rating?

A. Yes, sir.

Q. That disability rating at that time was a twenty-five per cent disability rating, wasn't it?



(Testimony of Roger Norman Libbey.)

A. Yes, sir.

Q. Now when was that changed, or was it changed?

A. Well, they claim I got better.

Q. Well, isn't it a fact that that has been the same always?

A. Well, it is ten per cent; you made a mistake.

Q. That's right, that is the question I am putting to you. Isn't that a fact?

A. Ten per cent rating, yes, sir. [77]

Q. Is that the rating that was given to you in the very first instance?

A. Yes, sir.

Q. Now you have been receiving payment on account of that, haven't you?

A. Yes, sir.

Q. And you have been receiving it ever since?

A. Yes, sir.

Q. You were receiving payment on account of that disability in August of 1950, isn't that right?

A. Yes, sir.

Q. Now, as a matter of fact, so far as the condition of your left leg was concerned in August of 1950, you did have a disability then, didn't you?

A. Yes, sir.

Q. A disability was in your knee for one thing?

A. Yes, sir.

Q. And also any disability in the muscles of the thigh?

A. I couldn't tell you that. I mean, the doctor never did tell me. You can't get a word out of them navy doctors.

Q. Now the disability in your knee was difficulty in bending it, isn't that so?

A. Yes, sir.



(Testimony of Roger Norman Libbey.)

Q. And——

A. (Continuing): My thigh was stiff. You could feel the [78] stiffness in it.

Q. The thigh was stiff and you had disability in bending your knee? A. Yes, sir.

Q. Now, as a matter of fact, when you went to the doctor in Sacramento on the 9th of August of last year, 1950, that you told us about, he never asked you to bend your knee, did he?

A. No, sir.

Q. He just asked to see you walk, isn't that so?

A. Yes, sir.

Q. And you showed him how you could walk?

A. Yes, sir.

Q. Now when you thought about the possibility of going to work for the Southern Pacific Company, who was the first person in the Southern Pacific Company that you went to see about it? I don't mean some friend of yours that you were talking about, but when you decided to go and apply for a job.

A. In Roseville I believe Lonergan was his name.

Q. That is Mr. Lonergan?

A. Yes, I am pretty sure. I don't know the fellow's names very well.

Q. Now has—strike that. Do you happen to know who he was?

A. I believe it is on my paper, Lonergan. Isn't it?

Q. Let me suggest this to you. If you don't

(Testimony of Roger Norman Libbey.)

know, don't say [79] so just because I say so. He was master mechanic at Roseville?

A. Yes, sir.

Q. Now at Roseville, when you went there to Mr. Lonergan's office, did you talk to him?

A. Yes, sir.

Q. And did you at that time in his office, sign a paper?

A. It has been so long ago it is pretty hard to remember. I believe I did.

Q. Do you remember what kind of a paper that was?

A. I don't remember.

Q. And then after that you went on down to the office in Sacramento?

A. Yes, sir.

Q. Up on the second floor of the station building there?

A. Yes, sir.

Q. That is where the general superintendent's offices are, isn't that right?

A. Yes, sir.

Q. And when you went there, did you sign a paper there?

A. I filled out unemployment papers there—a form, I mean.

Q. Let me show you this paper and ask you if the signature "Roger Norman Libbey" is your signature?

A. Yes, sir.

Q. And that was signed by you at Sacramento on the 9th of August, 1950? [80]

A. Yes, sir.

Q. Now, was that when you first went there or after you came back from the doctor?

(Testimony of Roger Norman Libbey.)

A. I believe it was after I went to the doctor, because it says, "I assume all risk," and everything.

Mr. Dunne: All right, we will offer this as our next exhibit in order.

Mr. Ryan: Your Honor, I object to that on the ground it is incompetent, irrelevant and immaterial, and it will revolve around the points of law that we will have to discuss later with your Honor. I object to it specifically on the ground that it is irrelevant, because it is given in violation of Section 5 of the Federal Employers Liability Act, and I won't argue it now, but just state that.

Mr. Dunne: Counsel went in very fully to what happened at the time he first made application. Now this is part of that same story.

Mr. Ryan: Yes, but, your Honor, I submit, I will go into that, that a waiver such as is contained there is against the policy of the law and is illegal, as a scheme or device to try to avoid liability in cases of this sort. And Section 5 of the Federal Employers' Liability Act specifically prohibits those kind of contracts being legal.

Mr. Dunne: That's if there is employment under the Act.

Mr. Ryan: Yes. [81]

Mr. Dunne: We haven't reached to that question yet.

Mr. Ryan: But I submit that he has already, the testimony so far shows that he was an employee, and under that case that I cited to your

(Testimony of Roger Norman Libbey.)

Honor, a student fireman is an employee under the circumstances such as these.

The Court: Well, all this is is a waiver, an exemption.

Mr. Dunne: Well there is also some recitation at the beginning of that which may reflect on what the relationship was. That is a question as yet to be determined, and it can't be determined by telling half the story.

The Court: Well, I will reserve ruling on that. The only point is whether or not this should be read to the jury or given to the jury at this time or not. The plaintiff just said that he signed it. We will mark it for identification as No. A for the defendant, and I will reserve ruling on it, whether it should be admitted. Defendant's Exhibit A.

The Clerk: Defendant's Exhibit A marked for identification.

(Whereupon document identified above was marked defendant's Exhibit No. A for identification only.)

Q. (By Mr. Dunne): I am going to show you a paper here, Mr. Libbey, and on the face of it you will notice that there are four different types of things on it. First, there's some printing, and then there is some typewriting. Then there is some writing in pencil. It looks to me like indelible [82] pencil. Then there are some things in there in ink. Now if you will just take and look at the face of this first and hold it so you can see it. Now, of



(Testimony of Roger Norman Libbey.)

course, none of that printing was anything that you put down there, was it? That was there already?

A. No, I didn't put this up here down.

Q. No. And you didn't put any of the type-writing down?

A. I didn't put no typewriting down, no.

Q. All right. Now if you look toward the center of it you will see some changes made, one change made in ink and then some other words, two other words written below in ink. Is that your writing, that ink writing? Do you see what I mean?

Mr. Ryan: Show it to him, counsel.

Mr. Dunne (Continuing): Let me show you what I mean.

A. This is not my writing there (indicating).

Q. These two things, there and that in ink; now that is not your writing, is it? A. No.

Q. Now will you look at the rest of that that is in indelible pencil, the part that is in indelible writing is your handwriting, isn't it?

A. Yes, sir.

Q. Let me see it just a moment now. Now over on the back there [83] is one place where there is some ink writing here. There is a change there which seems to be in ink, and there is some ink writing down at the bottom, some signatures and some stamped material and so forth on the back. Now none of that is yours, is it? A. No.

Q. But on the back there is also some handwriting, some longhand writing? A. Yes.



(Testimony of Roger Norman Libbey.)

Q. That is in pencil, the same kind of pencil as on the front? A. Yes, sir.

Q. Then down there, there is a signature there, which is your signature, isn't it? A. Yes, sir.

Q. Now the part that is on the back of that, that is in the pencil writing; that is also in your handwriting, is it not? A. Yes, sir.

Q. Now where did you fill that out?

A. It was up in the office, I think, up there in the—up above.

Q. In Sacramento? A. Yes, sir.

Q. That was on the second floor when you were sent down to Sacramento by Mr. Lonergan? [84]

A. Yes, sir.

Q. That was on the 9th of August?

A. Yes, sir.

Q. Let me look at it a minute. And here on the back it says, "applicant's signature."

Mr. Ryan: Just a moment, counsel. What is that you are referring to? Because there is a certain portion I am going to object to.

Mr. Dunne: I am not offering it yet. I am just referring to a signature and the date.

Mr. Ryan: Oh, all right.

Q. (By Mr. Dunne): You notice here it says, "Roger N. Libbey; date, 8/9/50." Now that date was written in by you? A. Yes, sir.

Q. All right.

Mr. Dunne: We will ask that this paper, as counsel says there is going to be some objection to

(Testimony of Roger Norman Libbey.)

portions of it, at any rate, be marked for identification.

The Clerk: Defendant's Exhibit B marked for identification.

(Whereupon document identified above was marked defendant's Exhibit No. B for identification.)

The Court: There is some discrepancy in the dates, isn't there? I thought the witness said it was the 10th.

Mr. Dunne: No, let's get this straight.

The Court: No, I mean the date on the writing is the 9th, [85] but I thought in the direct examination the witness said it was the 10th.

Mr. Dunne: No, I think not, your Honor.

Q. (By Mr. Dunne): You went down to Sacramento on the 9th, isn't that right?

A. Yes, sir. I made a mistake in the date. I was going to try to explain it to you.

The Court: All right.

Mr. Ryan: He went to Roseville, I think he said, on the 9th and then to Sacramento on the 10th. But this——

Mr. Dunne: This shows the 9th.

Mr. Ryan: That might be wrong. I don't know.

The Court: I see.

The Witness: I forgot whether I took the paper home or not. You see, there's another young fireman with me. He was the one that signed them. I thought—I didn't know that I was supposed to——

(Testimony of Roger Norman Libbey.)

See, I made one or two mistakes, and he was the fireman at the time. See, that signature is—he was the fireman at the time.

Q. (By Mr. Dunne): All right. Well now——

A. (Continuing): And I made a mistake, and he writ in there, I mean, like—he writ my brother's name and made a mistake, and he writ several other names in there. I didn't know—I mean, someone else helped me. I thought it would be all [86] right.

Q. (By Mr. Dunne): On this paper?

A. Yes, sir.

Q. All right. Show me what this fireman wrote in.

A. Oh, just right in here—names of father and mother, if living, and I got my mother's maiden name and her address. And I never did know her maiden name very well, and he spelled her maiden name. Then he wrote down, "Addresses of other relations," he wrote down my brother's name. That is that pen writing right there (indicating).

Q. All right. So that pen writing, you say, wasn't yours, and was made by this other fireman?

A. Yes. He told me, well, he grabbed the pen out of my hand and pulled it—put it down there. I had it down in my, I had a fountain pen in my pocket, but I didn't use the pen. I used the pencil, and he wrote that down there.

Q. All right. Now, on the back is there any writing that he put on there?

A. Yes, he signed his name in pencil. See this

(Testimony of Roger Norman Libbey.)

handwriting right here? Right down at the bottom, the different handwriting. He signed his signature in pencil. I don't know whether it is for reference or what.

Q. Well, you are pointing out the writing that starts in, "Donald J. Bird"? A. Yes. [87]

Q. And it ends up on the next line and says, "Roseville"? A. Yes.

Q. Now those two lines are in the writing of this fireman? A. Yes, sir.

Q. But the rest of the writing on the back is yours?

A. Yes, sir. He helped me fill it out. Several ones I didn't know.

Q. All right. Now let's get back to something else that his Honor raised a question on. You indicated you went down to Sacramento on the 10th. Now so far as this paper that I have here indicates, it indicates that it was made out at Sacramento, and in your handwriting there is the date August 9, 1950.

A. Well, it must have been the 9th, then; I made a mistake, I guess.

Q. In other words, so far as you know, the date on that, when you wrote it down, was the correct date?

A. You know, after a year, and being hospitalized, and everything, you forget them dates. If it just happened yesterday, I could remember.

Q. So that then, according to that, if that is correct, you were in Sacramento on the 9th?



(Testimony of Roger Norman Libbey.)

A. Yes, sir.

Q. And the first shift you went to the round-house was on the 10th? [88]

A. Yes, sir.

Q. The second shift that you went to the round-house, when you were hurt, was on the 11th?

A. Yes, sir.

Q. All right.

A. (Continuing): I am sorry I made them mistakes. I know we all make them.

Q. Well, we will try to get them straightened out as best we can here. And if you think you made any others, just don't hesitate to say so.

The Court: Well, is this a convenient time to suspend now?

Mr. Dunne: Yes, whenever your Honor wishes.

The Court: Are you about finished with that document?

Mr. Dunne: No, I am not. It will take some little time, so this is just as convenient a time as any, your Honor.

The Court: All right. Some of the Jurors come from across the Bay, and we don't like to keep you too long because transportation isn't too good, I understand.

We will take a recess until tomorrow morning at ten o'clock, members of the Jury; please return at that time and bear in mind the admonition that I gave you.

(Whereupon an adjournment was taken until tomorrow morning at ten o'clock, Tuesday, July 10, 1951.) [89]



Tuesday, July 10, 1951—10 A.M.

The Clerk: Libbey vs. Southern Pacific Company, further trial.

Mr. D. Ryan: Ready, your Honor.

Mr. Dunne: Ready.

Mr. D. Ryan: Your Honor please, may we call the plaintiff's doctor out of order? Dr. Guterman is present in Court.

Mr. Dunne: No objection.

Mr. D. Ryan: Dr. Guterman, will you take the stand?

JOSEPH GUTERMAN

called as a witness on behalf of the plaintiff. Sworn.

The Clerk: Please state your full name to the Court and to the Jury.

A. Joseph Guterman, G-u-t-e-r-m-a-n.

Direct Examination

By Mr. D. Ryan:

Q. Doctor, do you maintain an office in San Francisco? A. Yes, I do, at 450 Sutter.

Q. And are you licensed to practice medicine and surgery in the State of California?

A. Yes, I am.

Q. And, doctor, where did you receive your medical degree?

A. I am a graduate of the University of Vienna Medical School in 1927. [90]

Q. That is Vienna, Austria, doctor?

A. That is correct, sir.

(Testimony of Joseph Guterman.)

Q. And, doctor, prior to your graduation from the University of Vienna in Austria, what other college did you go to, or university?

A. I went to the University of Leipzig in Germany from 1921 to 1925, and from 1925 to 1927 I studied at the University of Vienna Medical School.

Q. Doctor, after graduating from the University of Vienna, did you make any specialized studies in medicine?

A. Yes, I did. I completed a six years' course in traumatic and orthopedic surgery, this branch of medicine which deals with injuries and diseases of bones and joints.

Q. And, doctor, where did you take that specialized study in diseases of bones and joints?

A. In Berlin, Germany.

Q. Is that also known as orthopedic medicine?

A. Orthopedic surgery.

Q. Surgery, yes. And, doctor, after your six years of specialized study in the diseases of bones and joints, in orthopedic surgery in Berlin, did you then practice medicine in Europe?

A. Yes, I did, in Warsaw, Poland, from 1933 to 1939, and at that time I was connected with the University Hospital in Warsaw, Poland, in charge of the orthopedic division. [91]

In 1939 I left Europe. I arrived in San Francisco in 1941. I served one year's rotating internship at the city and county Hospital of San Francisco, and after passing my Board I obtained my

(Testimony of Joseph Guterman.)

license to practice medicine and surgery in the State of California on August——

Q. What year was that?

A. August 26, 1942.

Q. And, doctor, since August, 1942, have you been practicing continuously here in San Francisco?

A. That is correct, sir.

Q. And since 1942 have you specialized in any phase of medicine or surgery?

A. My practice is limited completely to orthopedic and traumatic surgery.

Q. And, doctor, are you on the staff of any hospitals in this area?

A. Yes, I am on the staff at Mt. Zion Hospital, Franklin Hospital, Hahnemann Hospital and French.

Q. Do you do any teaching of orthopedic surgery?

A. I have a teaching appointment at the Mt. Zion Hospital.

Q. Doctor, at our request did you examine Mr. Roger N. Libbey?      A. I did.

Q. And when did you examine him, doctor?

A. I examined him twice, on July 3 and on July 6, 1951, at [92] my office at 450 Sutter.

Q. Now, doctor, when you first saw Mr. Libbey did you take a history from him?

A. I did, sir.

Q. And what history did he give you, doctor?

A. Mr. Libbey told me that he was 27 years old and that he was employed as a student fireman. He told me that about 10:30 p.m. on August 11, 1950,

(Testimony of Joseph Guterman.)

as he was in the cab of an engine there was a sudden blast of fire from the firebox. His hands and face caught fire and he had to jump off the engine to save his life. He fell. He landed on his right leg, then fell on his back and head. He was not rendered unconscious. Immediately he had a severe pain in his right thigh. He felt the side of the pain with his right hand and discovered the bone protruding under his trousers. He was aware of blood running down his right thigh.

He was taken by ambulance to the Mercy Hospital in Sacramento. He was taken immediately to surgery where under general anaesthesia an operation was performed on his right thigh.

A large plaster of paris dressing incorporating his abdomen, his right thigh, leg and foot, as well as his left thigh, was applied.

On August 12, 1950, he was transferred by ambulance to the Southern Pacific Hospital in San Francisco and he was [93] given several blood transfusions.

One or two days later a large plaster of paris dressing was removed. He was taken to surgery. A pin was placed through the upper part of his right leg. Weights were applied to that pin and he was treated in traction for a prolonged period of time.

During his hospitalization period the wound over his outside of his right thigh was dressed repeatedly. His right knee was aspirated repeatedly and fluid was removed.



(Testimony of Joseph Guterman.)

About two months later the traction was discontinued and the patient was again placed in a double hip spica.

On October 16, 1950, he was discharged from the S. P. Hospital in a double hip spica.

About January, 1951, all immobilization was discontinued and the patient began to walk with the aid of two crutches. Gradually he discarded the crutches and walked with the aid of one cane, and on March, 1951, he discarded the cane.

He has been reporting at regular intervals for the examinations to the Southern Pacific Hospital.

Q. Now, doctor, when you first examined Mr. Libbey, did he also give you his present complaints at that time?      A. Yes, sir.

Q. What were they, doctor?

Mr. Dunne: That is objected to as hearsay.

The Court: Well, I always consider that all these long [94] narrations, what the doctor did by way of examination, what he heard by way of history, are all unnecessary in the testimony, and once you qualify the doctor he can give his findings, what he found, and then if the other side wants to cross-examine him—but most of this is repetitious, the plaintiff gives the story and then the doctor gives the story, takes up an awfully long time, have qualified him, he has examined the man, just ask him to state what his findings were.

Q. (By Mr. D. Ryan): Doctor, when you examined Mr. Libbey, when you first saw him in July



(Testimony of Joseph Guterman.)

of this year, did you make a physical examination of his person?      A. Yes, I did.

Q. And, doctor, what did you find?

A. I found an old second degree scar measuring one and a half inches by one-half inch over his volar aspect of his right forearm. There was a minor old burn scar over his second metacarpal phalangeal joint, and I am pointing to the metacarpal phalangeal joint on the right hand.

I found that the patient was wearing a three-quarters of an inch high lift on his right heel. His right leg, or his right lower extremity was one inch shorter than his left lower extremity.

The patient walked with a limp. His limp increased while he attempted to walk on his heels and tip toes. His squatting [95] ability was limited to thirty per cent.

I found a slight restriction of right hip movements.

There was a marked anterior bowing of the right femur.

Q. What do you mean by bowing, doctor?

A. A change in the longitudinal axis of the femur, and I will be able to demonstrate this while commenting on the X-rays.

Q. Go ahead, doctor, let us know what you found.

A. There was a bony thickening at the level of the junction of the lower and middle third of the right femur. There was a two inch by one inch old

(Testimony of Joseph Guterman.)

scar over the outside of the right thigh three inches above the level of the knee joint.

There was a diminishing of the size of the right quadriceps muscle, and the quadricep muscle is that heavy muscle in front of our thigh which controls straightening of the leg and contributes to our erect gait.

Examining his right knee I found that his kneecap was barely moveable. There was a marked instability of the right knee joint in the anterior and posterior plane.

There was a marked restriction of any extension or straightening of the knee. He was able to extend his knee to 158 degrees as compared with a normal range of motion of 180 degrees.

I found a marked restriction of knee bending. He was able to bend his right knee five degrees short of right angle, [96] as compared—and range of motion was 85 degrees, as compared with a normal range of knee bending, which is 135 degrees.

I found very slight restriction of right ankle joint movements.

I found also evidence of a disability of this patient's left lower extremity which was due to an injury he sustained in 1943 while in the Marine Corps. This injury also consisted of a fracture of his left femur and healed with restriction of left knee motion with a slight restriction of left hip motion, with no shortening, and I think very slight restriction of left ankle joint motion.

(Testimony of Joseph Guterman.)

Q. Doctor, did you have X-rays made when you examined Mr. Libbey? A. Yes, I did.

Q. And have you those X-rays with you, doctor?

A. I have the X-rays with me and I have reviewed today in Court the X-rays which were taken in the S. P. Hospital and at the Mercy Hospital.

Q. Doctor, I show you the X-rays from the Southern Pacific Hospital. I think you have looked at them before Court. A. Yes, I did.

Q. And I think we have a shadow box over here, doctor, if you would like to put them in.

(Witness at the shadow box in front of the jury.)

A. I have an X-ray of Mr. Roger Libbey taken on August 12th, 1950. [97]

Q. What does that X-ray indicate, doctor?

A. The X-ray indicates that there is a front view of this patient's femur.

Q. What femur is that, doctor?

A. Femur is the large thigh bone, the largest bone in our body.

Q. And what leg would that be, doctor? [98]

A. Based on my knowledge of the case I would say that it would be the right femur, although it is marked with an "L."

Q. And the date again is what?

Mr. Dunne: Marked with an "L"?

The Witness: Right.

Mr. Dunne: That would be "left."

The Witness: August 12, 1950, and I am sure

(Testimony of Joseph Guterman.)

that is a mistake which happened when the man was admitted.

Q. (By Mr. D. Ryan): What does it show, Doctor, that X-ray?

A. The X-ray shows that the lower half of the right femur is immobilized in a basket splint. There are fine shadows, metal shadows which are the upper part of a basket splint. The X-ray shows also that there has been a comminuted fracture of that femur, that the fracture involves the knee joint, extends into the knee joint.

The fracture is at the level of the lower and middle third. I can count one, two, three, four bony fragments. I see that the femur is displaced to a considerable degree medially, to the inside, and that there is overriding or a shortening of this, of the fragments.

Q. Doctor, what do you mean when you say a comminuted fracture?

A. A fracture which consists of more than two fragments is called a comminuted or shatter fracture. A fracture which consists of two fragments only is called a simple fracture. [99]

Q. Doctor, what is a compound fracture?

A. A compound fracture is a fracture where the bone is in communication with the outside world where it pierces the muscles and skin and protrudes through the skin.

Q. Thank you, Doctor. Doctor, did you examine another X-ray from the Southern Pacific Hospital?

A. Yes.



(Testimony of Joseph Guterman.)

Mr. D. Ryan: At this time, your Honor, I wish to offer in evidence as Plaintiff's Exhibit next in order the X-ray from the Southern Pacific General Hospital dated August 12, 1950.

Mr. Dunne: No objection.

The Clerk: Plaintiff's Exhibit 5 introduced and filed into evidence.

(Whereupon the X-ray above referred to was received in evidence and marked Plaintiff's Exhibit No. 5.)

The Witness: I have here an X-ray labeled "A-14702" of Mr. Roger Libbey—that is a later date, I am sorry. I would like to go chronologically.

I have an X-ray labeled "A-14702" of Mr. Roger Libbey taken on August 15, 1950, and from my experience, looking at this label, I know that that X-ray was taken at the S. P. Hospital in San Francisco.

The Court: Well, there isn't any doubt about that?

Mr. Dunne: No.

The Court: These are hospital X-rays? [100]

Mr. D. Ryan: Yes, your Honor.

The Court: Let us eliminate the formalities and just describe the X-rays.

Mr. D. Ryan: Yes.

Q. Put it in the shadow box, please.

The Court: Don't need to identify them.



(Testimony of Joseph Guterman.)

The Court: This X-ray is marked with an "R," which means "right," and I see that the leg was placed in a plaster of paris dressing. I see the contours of the dressing and I see that the fracture has been reduced. There is still, however, evidence of some displacement in that fracture.

Q. (By Mr. D. Ryan): Does that show how the fracture has been reduced, Doctor, by any mechanical method, does it show on that X-ray?

A. No, the X-ray—I wouldn't be able to say how that fracture was reduced. There is a marked change as compared with the first X-ray I showed to the Court.

Q. Yes.

A. I would say that the fracture was reduced by traction, the pull.

Q. Yes.

Mr. D. Ryan: I offer this as Plaintiff's Exhibit next in order, the X-ray dated August 15, 1950.

The Witness: I have an X-ray dated August 21, 1950——

The Clerk: Plaintiff's Exhibit 6 introduced and filed [101] in evidence.

(Whereupon the X-ray above referred to, dated August 15, 1950, was received in evidence and marked Plaintiff's Exhibit No. 6.)

The Witness: Looking at that X-ray I can see that the plaster of paris dressing which was noted on the previous X-ray has been removed. A pin, called a Steinman, it is a metal pin, was placed

(Testimony of Joseph Guterman.)

through the upper part of this patient's right leg. The leg is in a metal frame and you again are able to see the comminuted fracture of the right femur. One fracture line, the second fracture line, the fracture line which goes into the patient's knee.

Q. Doctor, does that X-ray also show the fracture extending in to the femur, into the knee?

A. Very definitely so, and I am pointing out the fracture line which goes into the knee joint.

The Court: Mr. Ryan, I understood Mr. Dunne said in his statement there wasn't much question about these things.

Mr. Dunne: So far as I know there isn't, your Honor.

The Court: And not going to be disputed, why is it necessary for the Doctor to go into the history of the matter?

Mr. D. Ryan: If your Honor——

The Court: Describe the present condition.

Mr. D. Ryan: Yes, I will go into the present condition, seeing these are typical examples of the findings of the [102] Southern Pacific Hospital.

Mr. Dunne: So there is no question I will stipulate the man suffered a comminuted compound fracture of the right femur at about the level of the junction of the lower third and the middle third, and the fracture extended into the knee, and I suppose I better leave it for the Doctor to say what the residual results were.

Mr. D. Ryan: I will put on the present X-ray, your Honor.

(Testimony of Joseph Guterman.)

The Court: I think that would be better, Mr. Ryan, because if there is no dispute about it, it just takes up time.

Mr. Ryan: I will offer this last explanation—last X-ray, August 21, as Plaintiff's Exhibit next in order.

The Clerk: Plaintiff's Exhibit 7 introduced and filed in evidence.

(Whereupon the X-ray above referred to, marked plaintiff's Exhibit 7, was received in evidence.)

Q. (By Mr. D. Ryan): Now, Doctor, you testified that you had X-rays taken of Mr. Libbey when you examined him on July 3, did you not?

A. Yes, I did.

Q. And did you have further X-rays taken on your examination of July 6th? A. Yes, I did.

Q. Doctor, let us take them up chronologically then. Would you put in the shadow box the X-ray you took on July 3? [103]

A. The fracture filled in with new bone and consolidated and united, and the films which were taken on July 3, 1951, show the final result of said fracture. I have an X-ray taken by Dr. Joseph Levitin's office.

Q. Taken under your direction, at your request?

A. That is correct, on July 6th, 1951, and you are looking at the side view of this patient's right femur, a picture taken from the side. There is the hip joint and there is the knee joint, and you will

(Testimony of Joseph Guterman.)

see instead of that femur being straight and extending like this, you see the lower fragment is bowed about 20 degrees. I shall be able to demonstrate this on an X-ray still better.

Mr. D. Ryan: I offer this X-ray as plaintiff's exhibit next in order.

The Clerk: Plaintiff's Exhibit 8 introduced and filed in evidence.

(Whereupon the photograph above referred to, marked Plaintiff's Exhibit 8, was received in evidence.)

The Witness: You are looking at this patient's front view of his right femur and you will see the site of the fracture which is now filled with new bone and which fracture has solidly united at this level.

Q. What about the alignment of that bone, Doctor?

A. The alignment in the front view is satisfactory. The alignment in the side view shows that 20 degrees bowing. [104]

Mr. D. Ryan: I offer this X-ray as plaintiff's exhibit next in order.

The Clerk: Plaintiff's Exhibit 9 introduced and filed in evidence.

(Whereupon the X-ray above referred to, marked Plaintiff's Exhibit 9, was received in evidence.)

The Witness: There is another X-ray which



(Testimony of Joseph Guterman.)

shows the same condition, but it is a better film. I am pointing out to you the side view of the patient's femur, and you see the bowing. The axis of the femur should extend as far as my pencil does, but it is bowing backwards.

On the front view you see the satisfactory alignment, the united fracture, and you see evidence of shortening, that fracture united with a one-inch shortening of this leg.

Mr. D. Ryan: I offer that X-ray as Plaintiff's Exhibit next in order.

The Clerk: Plaintiff's Exhibit 10 introduced and filed in evidence.

(Whereupon the X-ray above referred to and marked Plaintiff's Exhibit No. 10, was received in evidence. [105])

The Witness: I show you again a side view of Mr. Libbey's right knee which shows cystic changes in his knee joint and in the front view and ordinarily a developing spur in the knee joint, symptoms of an arthritis which we call a post traumatic arthritis, an arthritis due to his injury.

Mr. D. Ryan: I offer these X-rays as plaintiff's exhibits next in order, two X-rays, plaintiff's exhibits next in order.

The Clerk: Plaintiff's exhibits 11 and 12 introduced and filed into evidence.

(Whereupon the X-rays referred to were received in evidence and marked plaintiff's exhibits 11 and 12.)



(Testimony of Joseph Guterman.)

Q. (By Mr. Ryan): Now, Doctor, from your examination of Mr. Libbey and the X-rays you had taken, what was your diagnosis of his condition in his right leg? First, your general diagnosis.

A. I felt that as Mr. Dume has correctly stated that the man sustained a compound comminuted fracture of the right femur at the junction of the middle and lower third; that he also sustained a low back strain and second degree burns of his right forearm.

Q. I believe you testified already, did you not, that the fracture extended into the right knee?

A. That is correct.

Q. And, Doctor, from your examination of Mr. Libbey, how did [106] the extension of the fracture in his right knee affect his right knee, in your opinion?

A. It resulted in a 20 degree loss of extension and 50 degree loss of flexion. It resulted in an instability of his right knee joint manifested by his complaint of his right knee giving away on him while he walks.

Q. And, Doctor, the bowing of the bone of the femur bone in the right leg, is there any way of correcting that?

A. I would not attempt to correct it at the present time any more.

Q. In other words, what effect has that on him, the bowing of the right femur?

A. The bowing of the right femur contributes to his shortening, is part of the shortening; the

(Testimony of Joseph Guterman.)

bowing of his right femur is responsible partially for the loss of knee extension and is a shift in his weight bearing line which puts a strain on the lower back region.

Q. And, Doctor, did you examine Mr. Libbey walking and climbing stairs?

A. Yes, I did. We walked out to the stairway at 450 Sutter Building and I told him to walk up a flight of stairs and to walk down a flight of stairs.

Q. How did he do it, Doctor?

A. I felt that he was very, very much handicapped by walking upstairs and downstairs. His limp increased markedly, his body [107] weight shifted forward and while walking downstairs he started the steps with his left leg.

Q. Doctor, can you explain the pain Mr. Libbey testifies he has in his back?

A. Yes, I can. In my opinion his pain is due to two factors. One, the results of a back strain he sustained when he fell from the engine, and the second factor is the shortening of his right lower extremity, which causes a change in posture and puts additional strain on the junction of the lumbar spine with the sacrum.

Q. Doctor, from your examination mechanically, why should he have pain on standing any length of time?

A. Because his lower extremity is shorter. To equalize the shortening he puts his foot, he stands on his tiptoes with his heels off the ground. He develops pain in his right calf and tension in the

(Testimony of Joseph Guterman.)

muscles of his right thigh and further up, let us say if he would be able to stand a long time he would develop an increase of his lower back pain.

Q. And, Doctor, Mr. Libbey also complains of pain and discomfort in sitting for any length of time. Can you explain that from your examination of this man?

A. Complaint of pain after sitting for a prolonged period of time is due to the post traumatic arthritis of his right knee joint. We know that arthritic joints have a tendency to develop symptoms after being kept in one position for, let [108] us say, any length of time, and therefore the patient has to change the position of his leg or he has to move his knee, and the same complaint he has while getting up in the morning from bed.

Q. And, Doctor, post traumatic arthritis is caused by what, in your opinion?

A. By injury, and it was caused in that case by the fracture which extended into the knee joint causing the damage of the knee joint itself.

Q. Doctor, in your opinion can Mr. Libbey engage in physical labor today?      A. No, sir.

Mr. Dunne: Objected to as calling for an improper conclusion.

Mr. Ryan: Withdraw the question.

Q. Doctor, from your examination of Mr. Libbey, his history and the X-rays taken, in your opinion is Mr. Libbey able to engage in physical labor today?

Mr. Dunne: That is objected to as not calling

(Testimony of Joseph Guterman.)

for proper medical opinion. That is not a matter of medical opinion.

Mr. Ryan: It is, your Honor, from the examination; from the examination, from the findings, based upon his opinion, based on findings, plus history.

The Court: Well, I don't know what the basis of that objection is. Isn't a medical man qualified to say what kind [109] of work, what kind of physical work the man can engage in?

Mr. Dunne: That is the point of the objection. I have no objection to describing what the man's condition is.

Q. (By Mr. D. Ryan): Let me ask you this, Doctor: What is your prognosis as to Mr. Libbey, Roger Libbey?

A. The prognosis is a very doubted one, because I feel that he is unable to be engaged in physical labor, and that he is in need of vocational rehabilitation. And I see grave problems for his rehabilitation, because he has complaints when he stands, when he sits and when he walks.

Q. Doctor, do you believe, in your opinion, from your examination and your X-rays taken of Mr. Libbey that he could today engage as a railroad man, climb on and off engines? A. No, sir.

Q. You think he ever will be able to do that in the future? A. No, sir.

Q. Doctor, do you think Mr. Libbey's pain will be permanent? A. I believe so.

Q. For instance, referring to the things you



(Testimony of Joseph Guterman.)

observed, such as the limping gait, what was the prognosis of that?

A. Limping gait will be permanent because it is due to the shortening of his leg, to the loss of extension of his right knee.

Q. Will that shortening of his right leg be permanent?      A. Oh, yes, sir. [110]

Q. Is there anything you know, Doctor, that medical science can do so that Mr. Libbey can get rid of the pain he is now suffering?

A. I do know, but I don't advise it in Mr. Libbey's case.

Q. What is that, Doctor, and why?

A. Because he has already a very considerable restriction of left knee motion due to his old injury in 1943, and if one would perform a knee fusion or operation which would leave his knee stiff, one would trouble Mr. Libbey to a very great extent.

Q. Where is his pain he complains of, Doctor?

A. He complains of pain—he complains of pain while walking distances longer than four blocks, in the right knee and the right thigh. He complains of pain while walking stairs, he complains of pain in his right knee joint and thigh while standing for five to ten minutes in one position, and he complains of a pain in his right knee joint after sitting for about a half hour.

Q. And, Doctor, do you feel that further treatment of any kind will result in any significant improvement of his condition?

A. No, I don't recommend any further treatment for Mr. Libbey.



(Testimony of Joseph Guterman.)

Q. Then you feel your findings, from your findings that his present condition is stationary and permanent?      A. Yes, I do. [111]

Mr. D. Ryan: That is all, Doctor.

Cross-Examination

By Mr. Dunne:

Q. Doctor, you have before you some notes and a report that you were using. May I see those?

(Witness hands counsel papers.)

Mr. Dunne: Thank you.

Q. That limp, Doctor, you describe as a mild limp?      A. Yes, I did.

Q. And the bowing you describe as a mild anterior bowing?

A. That is correct, of 20 degrees.

Q. There is also a bowing in the left thigh?

A. That is correct, sir.

Q. There is also some anterior-posterior instability of the left knee?

A. That is correct, sir.

Q. This man had a congenital abnormality in his lumbar spine?

A. He has 13 thoracic vertebrae.

Q. Only four lumbar?

A. That is correct, sir.

Q. That is a matter that he developed from work?      A. That is absolutely right.

Mr. Dunne: Thank you very much, Doctor. No further questions.

(Testimony of Joseph Guterman.)

Mr. D. Ryan: Your Honor please, there is one further [112] question I would like to ask on direct. May we open it for that?

The Court: Yes.

Direct Examination

(Continued)

By Mr. D. Ryan:

Q. Doctor, I believe you mentioned that there was a grave rehabilitation problem, vocational rehabilitation problem in this case. Why is that, Doctor?

Mr. Dunne: That has been asked and answered.

Mr. D. Ryan: He didn't explain why. I believe I asked him another question——

Mr. Dunne: Let us not take the time, I will withdraw the objection.

A. Because I think the agency which is concerned with vocational rehabilitation will have great problems in reeducating Mr. Libbey to some kind of a gainful occupation.

Q. In what respect, why, Doctor?

A. Because he is handicapped when he stands, when he walks and when he sits.

Mr. Ryan: Thank you, that is all.

Cross-Examination

By Mr. Dunne:

Q. Doctor, you spoke of that agency, that is the Bureau of Vocational Rehabilitation of the California State Department of Education?

(Testimony of Joseph Guterman.)

A. That is correct, sir.

Q. It is a service that the state maintains? [113]

A. That is correct, sir.

Q. For training people who either from sickness or injury have some disability?

A. That is correct, sir.

Q. It is an organization that examines them—examines them for and determines their fitness for a particular job, endeavors to select their job and then gives them training for the job?

A. That is correct, sir.

Q. In this case this man could go there and get training for a bench job?

A. I don't know whether he is suitable for a bench job. You mean, to sit at a bench?

Q. Sit at a bench, do bench work. If he is suitable for it he could get that kind of training?

A. That is correct, if he was suitable he could be a barber, a watchmaker. They have many jobs, and they select the right job for the right disability.

Q. And that is the service that the state maintains in conjunction with the Office of Vocational Rehabilitation of the Federal Government; the two governments work together on that?

A. That is correct, sir.

Mr. Dunne: I have no further questions.

Mr. Ryan: That is all, Doctor.

The Court: That is all, Doctor.

(Witness excused.) [114]

The Court: We will take the mid-morning re-

cess at this time. Ladies and gentlemen of the jury, please bear in mind the admonition of the court.

(Short recess.)

ROGER LIBBEY

resumed the stand, previously sworn.

Cross-Examination

(Resumed)

By Mr. Dunne:

Q. Mr. Libbey, when we suspended yesterday, I had shown you this personal record application form, defendant's Exhibit B for identification. Look at it again so you will know what I am talking about (handing to witness).

Now I think you told us that at the time you made this out, a fireman by the name of Bird was with you?      A. Yes, sir.

Q. Now in answer to questions as to education, asking you the name of the school, the location, the time attended, graduated and major subjects your answer was, first, "Silvan Grammar School, Citrus Heights, eight years; graduated, yes; major subject, grammar." That's correct, is it not?

A. Yes, sir, I graduated from grammar school.

Q. Yes. Now look at the next line. Under that in your own handwriting you filled out and stated that you had four years of high school, didn't you?

A. I want to explain that, I wanted to explain it to you [115] yesterday.

Q. Just a moment. We will give you plenty of

(Testimony of Roger Libbey.)

time to explain it. Let's get first what you did. You wrote down four years of high school, didn't you?      A. Yes, sir.

Q. And then under the question, "Graduated," you said you had graduated. You wrote down "Yes," isn't that correct?      A. Yes, sir.

Q. Now those two answers were untrue, weren't they?      A. Yes, sir.

Q. All you had was two years of high school?

A. Yes, sir.

Q. And you made those untruthful answers because you knew that to be employed as a fireman by the Southern Pacific Company they required a high school education, didn't you?

Mr. Ryan: Now one second. I object to that on the ground it is incompetent, irrelevant and immaterial.

A. Well, when I was hired——

The Court: Just a moment.

Mr. Ryan: And no proper cross-examination. In other words, that is a collateral matter, and——

The Court: I don't see anything collateral about it.

Mr. Ryan: But the question as to whether or not he knew that that rule, there is no evidence in here, there is no showing that actually there is that [116] rule.



(Testimony of Roger Norman Libbey.)

The Court: Well, he is asking him if he knew that. I will overrule the objection.

A. I didn't. Mr. Lonergan never said anything at all. The only thing he asked was if I was a vet, or within the draft age. He was afraid, they were taking the boys, and I showed him my birth certificate and discharge papers at that time.

Q. Didn't Bird tell you that it was required?

A. No, sir.

Q. He didn't say that it was required that you have a high school education?

A. No. No, sir, he had many firemen back east and, he was from back east, and they didn't require one back there.

Q. Why did you put down a deliberate misstatement, that you had had four years in high school?

A. I have made a lot of mistakes and after I filled the papers out I was going to go up and tell them. I remembered I had put down four years instead of two.

Q. But you knew perfectly well you hadn't had four years of high school at the time you wrote that in your own handwriting, didn't you?

A. I made a mistake. Instead of putting two, I put four. I mean, anybody can make a mistake.

Q. But you knew at that time that you never had more than two years of high school, isn't that so? [117]

A. I didn't mean to make a deliberate mistake like that, though, because I told Mr. Lonergan I only had two years of high school.

(Testimony of Roger Norman Libbey.)

Q. And you knew that you had never graduated from high school, didn't you?

A. No, I went into the service.

Q. That's right, and you wrote down there in answer to that question, "Yes," didn't you?

A. Well, in the service I studied, I had some records, I studied mechanics.

Q. Mr. Libbey, if you will just answer my questions, please. Under the question whether you graduated from high school you in your own handwriting wrote down the answer "Yes," didn't you?

A. Yes, sir.

Q. And that was an untrue answer, wasn't it?

A. Yes, sir.

Q. Now I want to show you another part of this.

Mr. Ryan: Your Honor, before we go on, in other words, to straighten this record out, I wonder if your Honor could tell the jury that the question, there is no evidence that it is the S.P.'s requirements that their firemen have four years of high school. That is absolutely untrue. But the question——

The Court: Please, Mr. Ryan; don't argue the matter [118] before the jury. That wasn't the question. All he was asked was whether or not the statement in the application was correct.

Mr. Ryan: Yes, but counsel has left the impression that they require four years.

The Court: Well, impressions are not evidence.

Mr. Ryan: All right, so long as we understand that.

(Testimony of Roger Norman Libbey.)

The Court: And the witness has already answered that he was not told that it was four years, that four years was required.

Q. (By Mr. Dunne): Now in answer to question No. 10, I will read it first and then I will show it to you. I will read the whole answer and the whole question:

“Have you ever been injured or suffered an amputation?”

“If so, state how, when, where and the nature thereof.”

Now, in your own handwriting to that, you wrote in the answer, “No,” didn’t you? A. Yes, sir.

Q. Now at the time you wrote in that answer, “No,” No. 1, you had suffered an injury to your left leg at Guadalcanal when you were in the service and had been in the hospital over a year, isn’t that so? A. Yes, sir.

Q. And in addition to that, while aboard ship, you had fallen down and fractured your left knee-cap, isn’t that so? [119] A. Yes, sir.

Q. Also prior to that time you had been in an automobile accident and fractured your left wrist?

A. Yes, sir.

Q. And at the time you wrote that answer “No,” it was an untruthful answer, wasn’t it?

A. May I explain that?

Q. Now just a moment; I will let you explain it. That was an untruthful answer? A. Yes, sir.

Q. All right, will you now, if you have an explanation, tell us what it is?

(Testimony of Roger Norman Libbey.)

A. See where it says "amputation," like that (indicating)? I thought it meant amputation.

Q. Now just read the whole thing——

Mr. Ryan: Your Honor, I object to counsel cutting him off. He had started to make his explanation. Why don't you let him finish it?

The Court: Had you finished with your explanation?

The Witness: Yes, sir, it says here——

The Court: He started to say he saw the word "amputation," and then you asked him another question. What is it you wanted to say about it?

The Witness: At the time I thought it meant "amputation," amputated limbs is what I thought it meant. I don't draw no [120] pension on an amputee, which I almost was, but I don't.

Mr. Dunne: All right. Will you look at that and read that whole question aloud, please?

A. "Have you ever been injured or suffered an amputation? If so, state how, when, where and the nature therefor."

Q. Now, at the time that you filled out and wrote the answer in, "No," you knew what an amputation was, didn't you?

A. That was a limb cut off.

Q. Yes, and you knew that an injury—you do have an injury, and could have an injury without an amputation, couldn't you?

A. I didn't think it meant that. I thought it meant an amputation, is what I thought it meant.

Q. But at that time, as a matter of what you



(Testimony of Roger Norman Libbey.)

knew, you knew you could have an injury without an amputation?

A. You could have an injury, yes, sir, without an amputation.

Q. And at the time, you knew the difference between the word "or" and the word "and," didn't you?

A. Yes, sir.

Q. "Or" means one thing or something different, doesn't it?

A. Yes, sir.

Q. And "and" means one thing together with another, doesn't it?

A. Yes, sir.

Q. It is perfectly simple English, isn't that so?

A. Well, it reads right here, it is talking about amputation. [121]

The Court: Let's see that (examining).

Q. (By Mr. Dunne): Now, Mr. Libbey, I am going to show you another paper. This one has two sheets as it is folded, so that we have got four sides. Now on this one, on the last sheet, it says part two, and then over on the back it says part three. Now you just look at those two so that you know what I am talking about (handing to witness). Under part two, and over on the back there is some handwriting there. Now none of that handwriting is yours, is it?

A. No, sir.

Q. Now if you will look at the very front, and let me show you—. May I have exhibit B for identification, Mr. Clerk?

The front of that is the same as this exhibit B; it is a carbon copy, made out at the same time, wasn't it?

A. Yes, sir.



(Testimony of Roger Norman Libbey.)

Q. Now I want you to look at the back of that sheet. No, if you will turn it inside out so you can get it back of the first sheet, which would be page two, the page here (indicating). Let me fold it over for you (folding document). Now you will see up at the top there, there is a printed form and there is some ink handwriting. That ink handwriting is not yours, is it? A. No, sir.

Q. Then below that there is a printed heading, "Part" and then a Roman Numeral II, and below that there are some printed [122] questions and there is some handwriting to those printed questions. Then at the bottom there is a signature. Now that signature, "Roger N. Libbey," at the bottom is your signature, isn't it? A. Yes, sir.

Q. You wrote that yourself? A. Yes, sir.

Q. Now let me see. I don't want to make a mistake on this. Now between part one, I said it was a Roman Numeral II but I am mistaken—between part one and the signature, in indelible pencil, there are written in a series of answers. Those are all in your own handwriting, aren't they?

A. Yes, sir.

Mr. Dunne: I will ask that this be marked as our next exhibit for identification.

The Clerk: Defendant's exhibit C marked for identification.

(Document identified above was marked defendant's exhibit C for identification.)

Q. (By Mr. Dunne): Now, Mr. Libbey, on that

(Testimony of Roger Norman Libbey.)

the third question was, "Have you ever received a pension or disability rating from any government or organization? If so, give details"; and for that you wrote in the answer "No," didn't you?

A. Yes, sir.

Q. Now at that time you did have a disability rating from [123] the United States government, didn't you?

A. Yes, sir.

Q. And that was an untruthful answer?

A. Yes, sir.

Q. At that time you were actually receiving disability payments from the United States government, weren't you?

A. Yes, sir.

Q. And are still receiving them?

A. Yes, sir.

Q. Now the sixth question, "Have you ever been confined to a hospital for surgical operation or following an injury? If so, give details briefly"; and to that you wrote in the answer "No," didn't you?

A. Yes, sir.

Q. At that time you had been confined to a hospital on three separate occasions?

A. Yes, sir.

Q. At that time, after the first occasion, the first occasion in the hospital you had had surgical treatment, had you not?

A. Yes, sir.

Q. At the time you wrote that answer in, "No," that was an untruthful answer, wasn't it?

A. Yes, sir.

Q. And you knew that it was untruthful at that time? [124]

A. Yes, sir.

Q. Now may I take this? Now you took this,

(Testimony of Roger Norman Libbey.)

filled this out and took it over to Dr. Cress in Sacramento, didn't you?      A. Yes, sir.

Q. And you saw him in his office?

A. Yes, sir.

Q. Now I want you to tell me what the conversation was at that office when you saw Dr. Cress.

A. What do you mean? It has been over a year ago; I can't remember the exact words.

Q. Give us your best memory on it.

A. Well, he checked my heart, checked my legs, checked my——

The Court: No, he wants to know what the conversation was.

Q. (By Mr. Dunne): What was said?

The Court: What did you say, what did he say, the best you can remember.

Q. (By Mr. Dunne): I want to know what you told him, and what he said to you as best you can recall it.

A. Well, the Doctor saw my scars and asked me, and I told him. He asked me to bend my leg and asked me to walk. And I wasn't thinking, at the time I bent my leg——

Mr. Ryan: I beg your pardon. If your Honor please, I couldn't hear that. Could we have that read, please?

The Court: Yes, read that back, Mr. Reporter.

(Record read.) [125]

Q. (By Mr. Dunne): Now do you remember anything else that was said in that conversation?

A. Well, he never asked me to bend my leg, and

(Testimony of Roger Norman Libbey.)

at the time I wasn't thinking of bending it, like you just said. That's all I can remember.

Q. That is all you can remember of the conversation?  
A. Yes, sir.

Q. Do you remember the doctor writing something down on that piece of paper while you were there?  
A. Yes, sir.

Q. Now as a matter of fact the doctor saw the scars on your left leg and he asked you about them, didn't he?  
A. Yes, sir.

Q. And didn't you tell him that you had fractured your leg in your early childhood?

A. No, sir, I did not tell him that.

Q. Didn't he write that down on this piece of paper in your presence? Now look at that; see if that wasn't written down right in your presence (handing to witness.)

A. This is a false statement, sir.

Q. Did he write that in your presence?

A. Not in my presence, because I told him about what happened to my leg, the real story—I told him about it. He asked me what island I was on and I told him.

Q. As a matter of fact, you told him that you had broken [126] your leg and it was before you were in the Marines, and you went into the Marines after that, is that a fact?  
A. No, sir, I didn't.

Q. And you told him that that injury had never bothered you all the time you were in the service, isn't that a fact?  
A. Not that I remember of.

Q. You told him that you had had that injury



(Testimony of Roger Libbey.)

when you were a little kid and you had gotten over it, and you had been able to go into the Marines and they had taken you, and you had never had any trouble with it; isn't that what you told him?

A. The only thing I remember telling him is him asking me my past record——

Q. Now after you came back from the doctor and came back to the superintendent's office, the station house at Sacramento, isn't that right?

A. Yes, sir.

Q. And you came back and saw Mr. Rupert; do you remember the name?           A. Yes, sir.

Q. And Mr. Rupert then gave you a lot of general instructions on matters of safety and being careful, didn't he?           A. Yes, sir.

Q. And he gave you a lot of books at that time?

A. Yes, sir.

Q. Gave you a book of rules of the transportation department? [127]           A. Yes, sir.

Q. Gave you a book of rules about the Hours of Service Act?           A. Yes, sir.

Q. Do you remember what other books he gave you?

A. No—handling and operation of engines. I didn't have much time to read them, because I was hurt just a day, just a shift after that. I looked them over.

Q. And did he *giving* you a book on lighting fires in engines?

A. I believe it said all that in the rules and regulations, how to operate an engine.



(Testimony of Roger Libbey.)

Q. But at any rate, he had a book and gave you a book about engines and it had in it about lighting fires, was that right? A. Yes, sir.

Q. Now then, you remember yesterday we had some question about a date, that you had dated this application on the 9th of August, and indicate yesterday that at the time you wrote that date you wrote it down correctly? A. Yes, sir.

Q. Now, then, if that is right, when you were in Sacramento, if that was on the 9th, then you went back to the round house to see Mr. Lonergan the next day? A. Yes, sir.

Q. And he sent you down to see Mr. Farrell, who was the night round house foreman?

A. Yes, sir. It was on the 10th when I saw Mr. Farrell. [128]

Q. Now at the time, at that time, you understood, and you had been told, that you would have to be learning for two weeks and pass an examination before you could be hired as a fireman, isn't that correct? A. Yes, sir.

Q. You did not expect to be paid for that two weeks? A. No, sir.

Q. And you were not, in fact, paid for it?

A. No, sir.

Q. Now then, after that, after you first went to see Mr. Farrell for one shift in the round house, you followed around with the fire-lighters?

A. Yes, sir.

Q. The only names you know for them are Tony and Bob? A. Yes, sir.

(Testimony of Roger Libbey.)

Q. Bob Chavez and Tony Lopez; were those the two fire-lighters? A. Yes, sir.

Q. And you also, wherever you were, one of them would be there or you would be with one of them? A. Yes, sir.

Q. And then that same thing was true on the next day, was it not? A. Yes, sir.

Q. All that was done was to go around and light fires, and you watched them and they told you what to do, is that right? [129] A. Yes, sir.

Q. Now you told us yesterday that the second day you were there, along toward the end of the evening, the end of the shift, some time between ten and eleven or so, they told you there were no more fires to light? A. Yes, sir.

Q. That is when you got on the locomotive with Peterson? A. Yes, sir.

Q. That locomotive was No. 2795?

A. Yes, sir.

Q. Now when you were going around with these fire-lighters, had they shown you what a firing valve was? A. Yes, sir.

Q. It is a handle that is near the fireman's seat-box in the cab of the locomotive? A. Yes, sir.

Q. And here are some pictures that your counsel have put in evidence; I will show you Plaintiff's Exhibit 3. Can you see the firing valve in that?

A. Yes, sir.

Q. Now will you hold that so the jury can see it, and point it out to them? Just put your finger on it.

(Testimony of Roger Libbey.)

A. This here, isn't it (indicating) ?

Q. It is a handle there, that handle; there is a rod that comes up and a quadrant, and then a handle to swing around on [130] that quadrant?

A. It is right there, yes, sir.

Q. I see. All right.

Mr. Dunne: May I point that out to the jurors in the far end of the box (indicating) ?

Q. And had you learned what the purpose of a firing valve was?

A. They told me to add oil. It was for oil.

Q. Now, incidentally, on this particular day before you got on the engine with Peterson, had you been on engine 2795 when the fire was started?

A. I don't remember, sir.

Q. Don't remember the fire being started in that particular engine?

A. No, sir, I don't remember. I have been trying to think all this time. I don't remember.

Q. You told us yesterday that you noticed that the door of the firebox was open? A. Yes, sir.

Q. When did you first notice that?

A. As soon as I got into the cab.

Q. Now that is as soon as you got into the cab with Peterson? A. Yes, sir.

Q. And it was open about three inches?

A. The width of a sand scoop. It was open a little bit [131] wider, about like that, something like that (indicating).

Q. That opened, and then it was swinging back

(Testimony of Roger Libbey.)

so that as the door would swing it was back a little bit, and in here would be the fire (indicating)?

A. Yes, sir. It opens toward the fireman.

Q. And it opens toward your side, and hinges on the engineer's side? A. Yes, sir.

Q. Now at that time where were you seated?

A. In the firemen's seat.

Q. How were you sitting in that seat?

A. Well, my legs, sitting up like you sit in a chair.

Q. And sitting straight forward, then?

A. Sitting like this, you know—like you are sitting in a chair (indicating).

Q. So at that time the firing valve was over to your right? A. Yes.

Q. As a matter of fact, the firing valve was farther back than the firebox door, isn't that so?

A. Yes, sir.

Q. As a matter of fact, when the puff or whatever it was of fire came out of the firebox door, it came out sideways in your direction, didn't it?

A. Yes, sir.

Q. And came out sideways toward the stem of the firing [132] valve?

A. Had me cut off on the deck, I think it is called the piggy deck or something like that; that deck you go out that is behind the fireman's seat.

Mr. Ryan: May we have that read? We couldn't hear that.

(Record read.)

(Testimony of Roger Libbey.)

Q. (By Mr. Dunne): At any rate, that was the direction it went; it went over toward the fireman's side, didn't it?

A. Yes, sir, had me cut off from getting out.

Q. You never made any attempt to swing off that, swing around and get out on the gangway, did you?

A. It was so doggone hot I couldn't get out.

Q. You never made that attempt, though, did you?

A. It was either burn up or jump out. Didn't have much time.

Q. You never made that attempt, did you?

A. No, sir.

Q. No. Now at any time when you were in that engine, had you touched the firing valve?

A. No, sir.

Q. Had you touched any of the atomizer valves?

A. No, sir.

Q. You know what those are? You know what I am talking about?

A. I know what they are; I never monkeyed with a thing.

Q. You didn't touch a thing? [133]

A. No, sir.

Q. The only thing that you did until this fire came out of the door was just sit and watch?

A. Yes, sir.

Q. You didn't attempt to take any part in the handling of the locomotive at all?

A. No, sir, I did not.



(Testimony of Roger Libbey.)

Q. And you didn't intend to, did you?

A. No, sir.

Q. And nobody had asked you to?

A. Nobody asked me; I figured it was none of my business, because he was backing the engine out.

Q. Now I want you to tell us as best you can how you got up and got out that window.

A. Well, it happened so fast I don't remember. I think I put my hand on the side and swung out with my legs (indicating).

Q. Put your left arm——

A. May I see that picture again?

Q. Sure. Now there are three of them. One just shows the firebox door.

A. I want the one with the window.

Q. But there's one that shows the window from the inside and one that shows it from the outside and shows the arm rest (handing to witness).

A. I believe I threw both legs out forward with my arm, if I [134] can remember, here, and went out that way (indicating).

Q. In other words, you grabbed onto the seat rest, the arm rest and pulled yourself up and swung your legs out?

A. Yes, sir.

Q. Kind of vaulted out, is that right?

A. Yes, sir.

Q. And you landed on your right leg?

A. Yes, sir. Some of it, just a slight force was on my left leg, but most of it was on the right leg.

Q. You got most of the force down there on your right leg?

A. Yes, sir.

(Testimony of Roger Libbey.)

Q. And that is the way you wanted to land, isn't it? Because you knew you had a bum left leg?

A. I knew I had a bum left leg, yes, sir.

Q. And you wanted to take the weight on your right leg?

A. I tried to land on my right leg, but anybody that is crippled on one leg, we always use the other leg without even thinking. You just use it; you just get so used to using it.

Q. And that is the way you landed?

A. Yes, sir.

Q. I see.

Mr. Dunne: I have no further questions. Oh, yes, I have one.

Q. Let me ask you this, Mr. Libbey; have you ever gone to the Bureau of Vocational Rehabilitation of California's State [135] Department of Education in Sacramento?

A. At one time I went, just for a couple of days.

Q. And you haven't gone back since?

A. No, sir.

Q. How long ago was that?

A. I don't remember; '47 or '48. It must have been '47, something like that. It has been so long ago——

Q. But not since you were hurt this time up in Roseville?

A. No, I have been sick all the time and in bed most of the time.

Mr. Dunne: I have no further questions.

(Testimony of Roger Libbey.)

Redirect Examination

By Mr. Ryan:

Q. Mr. Libbey, as a matter of fact, are you still under the treatment of the Southern Pacific Hospital?

A. Yes, sir. I should be there now, I guess.

Q. Yes. And have you been under treatment continuously since this accident?

A. Yes, sir, I report to the little hospital, the first aid station in Roseville.

Q. Pardon me?

A. I report once in a while to the first aid station in Roseville. I did up until my wound healed.

Q. Oh, I see. And what do they do for you at the first aid station in Roseville?

A. They used to dress my leg. I used to get pain pills [136] there from the nurse.

Q. Had there been any time that you had been finished with your treatment from the Southern Pacific Hospital?

A. No, sir, I still have a pass in my pocket.

Q. Yes. Now there's one question I might have overlooked yesterday. You testified that on the second shift, I think you said you fired yourself three locomotives?

A. Yes, sir.

The Court: He said two.

The Witness: Yes, two.

Mr. Ryan: Two, was it?

A. Yes, sir, two.

Q. Do you remember what kind of locomotives

(Testimony of Roger Libbey.)

they were? As to whether they were road engines or switch engines?

A. I don't remember the numbers, but——

Q. I don't mean the numbers.

A. It wasn't the one I was hurt in. I know that.

Q. No, no, do you know whether they were road engines or switch engines?

A. One was aallet and one a switch engine.

Q. What is aallet?

A. It is an engine, it is—well, it's a bigger type engine that goes over the—that pulls the cars over into Reno over the hills. They have to change engines in Roseville. [137]

Q. I see. Theallet is the kind they use going over the Sierra Nevada Mountains?

A. Yes; in the 4000 class, I think.

Q. Yes, and one of the fires that you yourself lit on that second shift was on aallet?

A. Yes.

Q. I see. Now may I see that last form that was used?

Now when you went to see the Southern Pacific doctor in Sacramento, Dr. Walter W. Cress, was this question asked and this answer made by you? No, I had better read it with you. And I am referring, for the purpose of the record, to defendant's C for identification. Now on part one that Mr. Dunne asked you about, I will ask you to state whether or not this question was asked you and this answer given by you:

(Testimony of Roger Libbey.)

“Q. Are you in good health?”

And the answer,

“A. Yes.”

When were you—strike that. And then the question:

“When were you last attended by a physician and for what ailment?”

And the answer,

“A. One year ago, Veterans’ Hospital.”

Now did you give that? A. Yes, sir.

Q. And is that your handwriting in indelible pencil where you said that you were attended by a physician one year ago at the Veterans’ Hospital? [138] A. Yes, sir.

Q. Was that done at the office of the Southern Pacific doctor, Dr. Cress? A. Yes, sir.

Q. Now when you put down that you were treated one year ago at the Veterans’ Hospital, did or did not Dr. Cress ask what you were treated for?

Mr. Dunne: That is objected to as leading and suggestive.

Mr. Ryan: I put it in the alternative.

Mr. Dunne: He should ask for all the conversations.

Mr. Ryan: “Did he or did he not”?

The Court: Overruled.

Q. (By Mr. Ryan): You can answer it.

A. What I was treated for?

Mr. Ryan: Will you read it to him, Mr. Reporter?



(Testimony of Roger Libbey.)

(Record read.)

A. Yes, sir.

Q. (By Mr. Ryan): What did you tell him you were treated for?

A. I was supposed to have an operation on my left knee, but I never did have it.

Q. Is that what you told him?

A. No, but that is what I was supposed to have.

Q. No, no; please listen to my question. I said, "What did you tell Dr. Cress you were treated for at the Veterans' Hospital?" [139]

A. My left leg.

Q. All right. Did he ask you, then, when you told him you were treated for your left leg at the Veterans' Hospital, how you got those scars on your left leg?

A. I told the gentlemen over there before, how. I told the doctor how it happened.

Q. What did you tell him?

The Court: Well, he has already testified to that.

Mr. Ryan: All right.

Q. Is that when you told him in answer to those questions, is that when you told him about how you got your war wound? A. Yes, sir.

Q. All right. And did you not at that time, when you signed this document, Defendant's No. C for identification know that up in the top of it it says this:

"Order for physical examination to Doctor Walter W. Cress at Sacramento, California.

(Testimony of Roger Libbey.)

Please examine in accordance with Company regulations applicant, whose record and signature appear on other side, and whose personal description follows. Height, 5'11½". Weight 165 pounds. Eyes, green. Hair, brown. Complexion, red. Application for employment has student fireman, Division of Sacramento, Southern Pacific Company; years employed by Company, new. Signed, W. L. Jennings, Superintendent." [140]

Did you know that all that was on there?

A. Yes.

Q. All right. In fact, are you the one who handed this document, Defendant's Exhibit C for identification to Doctor Cress when you go to his office?

A. Yes, sir.

Q. And did you know that part three of this document that I am talking about states this: "Applicant is physically average subject for position as student fireman. His application is—," and then the words appear, "rejected," or "refused," and under the words "his application is accepted," there is a circle around it, is that correct?

A. Yes, sir.

Q. "Accepted"?

Mr. Dunne: Well now, in answer to the question, the question was, did he know that. That those things were on there, that is.

Q. (By Mr. Ryan): Let me ask you this question instead of——

Mr. Dunne: Well, why don't you——

(Testimony of Roger Libbey.)

Mr. Ryan: Wait a second. Instead of the one counsel asked, I will ask this question.

Q. After the Doctor filled in the back of it, was it given back to you to bring back to the Superintendent? A. Yes, sir.

Q. And are you the one who delivered it back to the Superintendent? [141] A. Yes, sir.

Q. And before you gave it to the Superintendent, did you look at it to see whether you passed the physical examination or not?

A. It was secured in a—Well, I knew at the time that the doctor told me that I passed it. But he secured it in an envelope.

Q. I see. A. It was sealed.

Q. Yes? He told you successfully passed your physical examination?

A. I saw him circle that there.

Q. No, that is what I am asking you.

A. He circled this right here, that I passed the examination.

Q. And was that in your presence?

A. Yes.

Q. So here's "application accepted," and you saw him circle that? A. Yes, sir.

Q. Did you see him sign this "Cress, M.D."?

A. Yes, sir.

Q. All right. And also in regard to this same paper—Incidentally, he made all this out in your presence, didn't he? A. Yes, sir.

Q. As you told Mr. Dunne, you knew what he wrote down here, is [141-A] that right?

(Testimony of Roger Libbey.)

A. Yes, sir.

Q. All right. Then I will ask you about this——

Mr. Dunne: May I have that last question and answer?

(Record read.)

Mr. Ryan: All right. Now under part two, physical examination, did you see the doctor write this down under this—this is in printing—“skin, scars, ulcers, excessive perspiration and vasco-motor tone.” That is all fine print, and then in ink, whose handwriting is that in ink? Who wrote that?

A. Must have been the doctor.

Q. All right, and in answer to that it says this, “multiple scars left thigh and slight deformity left thigh. Result of compound fracture of femur during early childhood.”

A. I didn't tell him childhood. I told him——

Q. You didn't tell him that? A. No, sir.

Q. And did you see him write this down under “blood pressure”: systolic, 110—diastolic, 76? Did you see him write and fill in that stuff?

A. He was taking my blood pressure and everything; I saw him.

Q. All right. And did you see under “head, negative; eyes, negative; ear, nose and throat, negative; mouth and teeth, negative; neck, negative; heart and arteries, negative; lungs, negative; abdomen, negative for scars hernia or masses; genital [142] urinary, negative; bones and joints, negative; for osteomyelitis,——”

(Testimony of Roger Libbey.)

The Court: Well, you are just reading that, Mr. Ryan. I suppose sometime or other the jury is going to be permitted to see it. I *don't think* it serves much of a useful purpose for the attorneys to read this, without letting the jury see all of it.

Mr. Dunne: I didn't offer it in evidence.

The Court: I know you didn't.

Mr. Dunne: But I will at this time, your Honor.

Mr. Ryan: I wanted to get as much of it as I could in evidence, because maybe he won't offer it in evidence. I don't know.

Mr. Dunne: Well, you always assume I won't.

The Court: Well, at sometime or other, I assume the jury will be permitted to see it. There is a basis for admitting it in evidence.

Mr. Dunne: I will make the offer now, your Honor, and we will clear the record.

The Court: Both of them may be admitted?

Mr. Dunne: Yes.

Mr. Ryan: Wait; I have first, and the one that I have just showed the jury, I mean, the one I showed the witness, I have no objection to that one, the one I was referring to.

The Court: Well, what is the number of [143] that?

The Clerk: That is Plaintiff's or Defendant's Exhibit C.

The Court: All right, that is admitted as Defendant's Exhibit C.

The Clerk: Defendant's Exhibit C for identification received in evidence.



(Testimony of Roger Libbey.)

(Whereupon Defendant's Exhibit C for identification was received in evidence.)

Mr. Ryan: All right, now as to the other, I want to merely say this. As to the personal record, this is Defendant's Exhibit B for identification that I am referring to, your Honor; I have no objection to all of it going in, with one exception. The action that the company took after his accident, which is down at the bottom here, is the exception.

The Court: Well, that is obvious——

Mr. Ryan: And that is on the ground that it is a self-serving declaration.

The Court: Well, I notice it is not dated until October.

Mr. Ryan: No, that's right.

Mr. Dunne: I haven't offered that one.

The Court: All right.

Mr. Ryan: With the exception of that——

The Court: All of that document except the action of the company in October may be admitted.

Mr. Ryan: All right.

The Clerk: Defendant's Exhibit B admitted in evidence. [144]

(Whereupon Defendant's Exhibit B for identification only was received in evidence.)

Q. (By Mr. Ryan): You testified in answer to one of Mr. Dunne's questions that Mr. Lonergan, the Master Mechanic—whom he has identified the man as—at Sacramento, questioned you regarding

(Testimony of Roger Libbey.)

your education. Is that correct?      A. Yes, sir.

Q. And when you first went up there to get the job, was that when you told Mr. Lonergan that you had only two years high school?      A. Yes.

Q. I see. And then in regard to the part of the question, that question there that asked, in that slip that you filled out in the doctor's office, "Have you ever received a pension," did you or did you not tell the doctor that you were receiving a Government pension?      A. I told the doctor.

Q. Did you tell him how much of a pension it was?      A. I remember distinctly I told him.

Q. How much did you tell him?

A. Ten per cent.

Q. Did you tell him that was for this wound you got on Guadalcanal?      A. Yes, sir.

Q. Did he put that down? [145]

A. I don't know.

Q. Oh yes, as long as we are going into that; how much a month were you getting for this ten per cent disability?      A. \$15.

Q. \$15?      A. Yes, sir.

Q. And that is what you are getting now?

A. Yes, sir.

Q. That has always been ten per cent; you never had a higher rating than ten per cent?

A. At one time I was getting more than that. I wasn't discharged with ten per cent. I was getting \$115 at one time.

Q. I see. You mean when you first came out of the service?      A. Yes, sir.

(Testimony of Roger Libbey.)

Q. What percentage of disability were you getting when you were getting \$115 a month?

A. I don't remember now.

Q. I see. Haven't you got the slightest idea?

A. Around 70 per cent or something like that.

Q. Around 70 per cent; all right, and was it brought down from 70 to 10, or did it gradually come down?

A. Well, it came down. Cut in half then, and then cut down to ten per cent, because I was working, see.

Q. I see.

A. I was—you know, when a fellow is working, you shouldn't [146] have——

Q. So you went down from 70 per cent to 35 per cent?      A. Yes, sir.

Q. And then you had that for a little while?

A. Yes, sir.

Q. Then it went down to ten per cent?

A. Yes, sir. I was working handling green lumber working in a logging camp.

Q. What percentage of disability were you getting when you were working for the United States Army Transport Service on boats?

A. I think the same per cent. That is probably where they caught up with me.

Q. You mean the ten per cent?      A. Yes.

Q. I see; that is when they caught up with you.

Mr. Ryan: That's all, your Honor.

The Court: Anything else?

(Testimony of Roger Libbey.)

Mr. Dunne: I have just one or two questions and I will be finished.

Recross-Examination

By Mr. Dunne:

Q. Now, Mr. Libbey, I want you to look at this again and at the question Mr. Ryan read to you: "Are you in good health? When were you last attended by a physician and for what ailment?" And then it says, "One year ago, Veterans' Hospital?" (handing [148] to witness).

Now you told Mr. Ryan that the doctor looked at that and called that to your attention and you told him that was on account of your knee?

A. Yes, sir.

Q. Well, that was wrong, wasn't it? That hospitalization, one year ago, was when you hurt your wrist in an automobile accident, wasn't it?

A. Well, they also was going to work on my knee, too.

Q. Let's take one thing at a time. You went to the Veterans' Hospital at that time on account of an injury to your wrist in an automobile accident, didn't you?

A. Yes, sir.

Q. And isn't that what you told the doctor?

A. I thought I told him my knee was, they was going to operate on my knee too, after they set my arm, but they didn't.

Q. When he asked you about being in the hospital a year before, you told that was on account of

(Testimony of Roger Libbey.)

your injury to your wrist in an automobile accident, didn't you?           A. Yes.

Q. I see. .

A. I remember telling him too I was supposed to have an operation on my knee, too, which I never did get.

Q. And this statement about your left leg, "fractured femur in early childhood"; that is something that the doctor just [148] dreamed up, is it?

A. I never told him that.

Q. Did he say anything about that at all?

A. I told how it happened. It didn't happen in childhood.

Q. Where did he get the word "childhood"?

Mr. Ryan: I object to that on the ground it calls for the conclusion of the witness, where the doctor got the word.

The Court: Unless he knows.

Q. (By Mr. Dunne): Do you know where the doctor got the words "early childhood"?

A. I didn't tell him that.

Q. Do you know where he got it?

A. I don't know.

Q. As far as you know, he just dreamed it up out of the thin air?

Mr. Ryan: Object to on the ground it is argumentative.

The Court: Yes, sustained.

Mr. Dunne: I have no further questions.



(Testimony of Roger Libbey.)

Further Redirect Examination

By Mr. Ryan:

Q. Now let me ask you this in regard to that last question. I thought you told me on my redirect examination of you that when this question was asked, "When were you last attended by a physician and for what ailment?" And you wrote down, "One year ago, Vets' Hospital," you told them that was in connection with your war injury. Did you tell him that or did you [149] not?

Mr. Dunne: That is objected to as no proper foundation.

Mr. Ryan: Well, I want to get this concrete——

The Court: You are going over the same ground again.

Mr. Dunne: Exactly. I think counsel has answered—counsel has gotten his answer on that.

The Court: I think, counsel, he has answered all the questions on that subject already.

Mr. Ryan: I want to just clarify it.

The Court: Well, all right, ask him them again.

Mr. Ryan: All right.

A. At first I went to Oak Knoll with a broken wrist, and then I got there, when I got there, they wanted to operate on my knee too.

Q. No, that isn't my question. I asked you, did you, when you wrote down here that you were in a Veterans' Hospital, did you tell the doctor at that time that you had been treated in Veterans' Hospitals for your war injury?

(Testimony of Roger Libbey.)

A. I told him so.

Mr. Ryan: All right, that's all.

The Court: Well, we will take a recess, members of the jury, until two o'clock. Please bear in mind the admonition of the Court.

(Whereupon an adjournment was taken until this afternoon at two o'clock.) [150]

The Clerk: Further trial.

Mr. Ryan: Mr. Petersen, will you please take the stand?

### THEADORE W. PETERSEN

called as a witness on behalf of the plaintiff, sworn.

The Clerk: Please state your full name to the Court and to the jury.

A. Theadore W. Petersen.

### Direct Examination

By Mr. Ryan:

Q. What is your first name? A. Theadore.

Q. Theadore? A. Theadore, T-h-e-a——

Q. T-h-e-a-d-o-r-e? A. Yes.

Q. Petersen, P-e-t-e-r-s-e-n?

A. That is right.

Q. All right. Now, Mr. Petersen, where do you live?

A. 512 Nyles Avenue, Rosedale, California.

Q. And what is your occupation?

A. Locomotive fireman.

(Testimony of Theadore W. Petersen.)

Q. By whom are you employed?

A. Southern Pacific Company.

Q. How long have you been employed by the Southern Pacific Company?

A. Since 1943, June the 10th. [151]

Q. And during all of that period were you a locomotive fireman? A. No.

Q. What were you before that?

A. I hired out as a car helper in 1943.

Q. As a what? A. Car helper.

Q. Fireman helper? A. Car, c-a-r.

Q. Yes. When did you become a fireman?

A. 1946, August 31.

Q. And from '46 up to the present time have you been a fireman continually? A. Yes, I have.

Q. All right. And during all of that time since you became a fireman have you been working out of the roundhouse at Roseville, California?

A. That is right, yes, that is the home terminal there.

Q. All right. Now, at the time of this accident what were you acting as?

A. At that time I was a hostler in the roundhouse.

Q. And for how long a period of time prior to the date of this accident, which was August 11, 1950, had you been a hostler in the Roseville roundhouse?

A. Well, Roseville doesn't hire any hostlers as an actual job. [152] It is all locomotive firemen hostling is what it is, and you either make a bid job

(Testimony of Theadore W. Petersen.)

or are—you catch it from the extra board. At that time I believe I had caught the job from the extra board.

Q. I see. So there was no such job known as hostler?  
A. Not in Roseville, no.

Q. You're all firemen?  
A. That's right.

Q. All right. But my question was this: How long prior to—for how long a period prior to the time of this accident had you done the work of a hostler in the Roseville roundhouse?

A. Qualified for hostling in 1947.

Q. And had you on many occasions from 1947 until August, 1950, acted as a hostler at Roseville?

A. That is right, yes. I don't know how many times, but I had, yes.

Q. All right. Incidentally, there are two roundhouses at Roseville?  
A. There is, yes.

Q. And what is the roundhouse where this accident happened, what was that called?

A. Roundhouse No. 2, the big, the large roundhouse.

Q. What kind of engines do they keep up there?

A. At that time they were keeping Malleys and 44 Hundreds, which is a passenger engine. [153]

Q. Yes. These Malleys, let me ask you something about them. What are they used for?

A. Well, that is a freight locomotive for mountain service.

Q. And mountain service where?

A. That is between Roseville and Sparks, Nevada.

(Testimony of Theadore W. Petersen.)

Q. I see. Now, Roseville is a big junction point, isn't it?      A. That is the breaking point.

Q. Is that what you call it, the breaking point? What do you mean by that?

A. That is where all the trains come up, are broken up, made into other trains, transferred out.

Q. And then when the trains are broken up and made into other trains where do they go when they go north, to what states do they go?

A. Well, going north they would go into Oregon.

Q. And going east where would they go?

A. Into Nevada.

Q. And Utah also, I guess?

A. That is right.

Q. As far as Ogden do you go?

A. The Southern Pacific goes as far as Ogden, yes.

Q. Do you remember the engine that plaintiff got hurt on?      A. No. 2795.

Q. All right, 2795. Now, what kind of an engine was 2795?

A. It is a consolidation engine. [154]

Q. I mean as to whether it was a road engine or a switch engine?

A. It is used in both services.

Q. In both switching and road? Now, at the time of the accident you were taking 2795 some place, weren't you?

A. Taking it from the roundhouse to the relieving track.

Q. To the what track?



(Testimony of Theadore W. Petersen.)

A. Excuse me, from the roundhouse to the preparatory track.

Q. Preparatory.

A. Yes, it was to be used in service that evening.

Q. Yes. Do you know what service 2795 was to be used for that evening?

A. It was called for Bowman Turn.

Q. Pardon me, Bowman Turn?

A. Bowman Turn, that is right.

Q. Bowman—— A. Local freight.

Q. Bowman, B-o-w-m-a-n? A. Yes.

Q. Bowman Turn? A. Yes.

Q. And where is Bowman located?

A. That is, I believe it is eight miles west of Colfax.

Q. And as I recall is——

A. East of Roseville. [155]

Q. Yes. In going east you pass through Ogden first, don't you? A. Yes.

Q. And then Colfax.

A. Colfax, Applegate and Bowman—I mean, Auburn, Colfax.

Q. Yes. All right. Now, on this Bowman Turn what type of cars would that engine pick up?

Mr. Dunne: That is objected to, without foundation.

Mr. Ryan: I submit——

Q. Do you know what type cars they picked up?

A. Well, usually it is refers and gondolas.

Q. All right. Now, refers, what is carried in refers? A. Perishable goods.

(Testimony of Theadore W. Petersen.)

Q. Perishable food?

A. Fruit and vegetables.

Q. Fruit and vegetables. Now, on this Bowman Turn local did they get these refers and so forth and bring them into Roseville?

A. At sometimes they are, yes.

Q. And then when they would bring them into Roseville where would they—would they be put on to other trains and moved out from Roseville?

Mr. Dunne: That is objected to without foundation.

Q. (By Mr. Ryan): Do you know from your years' experience up there?

A. That is usually the procedure, yes. [156]

Q. And would they go out of the State?

Mr. Dunne: That is objected to without foundation, isn't the slightest foundation for this man—

Mr. Ryan: He knows that, your Honor, that is common knowledge up there. Let me ask you a direct question.

Q. When this Bowman local would go up and bring these cars into Roseville, what usually happened to the cars after the Bowman local brought them into Roseville?

Mr. Dunne: Objected to without foundation.

The Court: Well, if he knows.

Q. (By Mr. Ryan): If you know, yes.

A. Do I answer the question?

The Court: Yes.

The Witness: Those cars, as they are brought

(Testimony of Theadore W. Petersen.)

into Roseville are put into freight trains, either moved north, south, or east.

Q. When you say east or north, can you state whether or not they got out of the State of California?

Mr. Dunne: Objected to, without foundation.

Q. (By Mr. Ryan): If you know.

Mr. Dunne: This man hasn't shown that he has the slightest basis for knowledge of where any particular car is going, cars from Bowman are going.

Mr. Ryan: Your Honor, I submit that objection would go to the weight of his testimony rather than to admissibility. I [157] venture to say not only any railroad man in Roseville, but almost every citizen around there know where cars are going after they leave Roseville, going intrastate and interstate.

The Court: You may develop from the witness the extent of his knowledge of the movement of railroad cars and do that first.

Mr. Ryan: Thank you, your Honor. I think that is advisable.

Q. Now, you say you have been a locomotive fireman since 1946—yes, August, 1946; right?

A. Right.

Q. And as such locomotive fireman prior to the time of this accident have you ever taken trains out of the state from Roseville? A. Yes.

Q. Where did you go some of your trips as a fireman, for instance?

A. Run from Roseville to Sparks, Nevada.

Q. Sparks, Nevada? A. Yes.

(Testimony of Theadore W. Petersen.)

Q. Yes.

A. Run from Roseville to Gerber, California.

Q. And from Gerber where did they go beyond Gerber?

A. Go to Dunsmuir and up into Oregon.

Q. Let me ask you this: In any of these trips that you have made as a locomotive fireman from Roseville to Sparks, Nevada, did you ever take any cars that were brought in, any refers, rather, that were brought in on the Bowman Turn and take them out of state?

Mr. Dunne: That is objected to, without foundation. This is just pure guess. This man, if he has seen the manifest, seen the waybills, seen the car tags or otherwise actually knows.

Mr. Ryan: I submit that you don't have——

Mr. Dunne: Purest kind of speculation.

Mr. Ryan: What counsel——

Mr. Dunne: As a matter of fact we know that firemen don't know those things. They are on the engine, go along with the engine, know what weight they have behind them and what cars they have behind *him* and that is all they know.

The Court: This witness also said he was a hostler there and he may have seen the making up of the trains as he handled the engines.

Mr. Dunne: If he has, but so far it doesn't appear, no foundation for this but guess and speculation.

Mr. Ryan: Is there a question pending?

The Reporter: Yes.



(Testimony of Theadore W. Petersen.)

Mr. Ryan: Read the question.

(Record read by the reporter.)

A. I couldn't say whether I did or not. The cars that come into Roseville——

Mr. Dunne: Your Honor please, I think that answers the [159] question.

Mr. Ryan: I submit he is entitled to make an explanation of that. He was going to state something and counsel cut him off.

Mr. Dunne: Can't be an explanation when the witness said he doesn't know, doesn't know whether he did or not.

Mr. Ryan: May I have that answer complete, your Honor?

Mr. Dunne: May I have the question first?

Mr. Ryan: I think he understands the question, he was cut off from his answer.

Mr. Dunne: But your Honor, may I have the question read?

(Question and answer read by the reporter.)

Mr. Dunne: I think the answer—I think the question has been answered, if he can't say whether he did or not, if your Honor please.

The Court: He didn't complete his answer. You may finish your answer.

The Witness: What I was going to say, cars coming into Roseville are made into trains. We receive our train-registered check, the amount of cars



(Testimony of Theadore W. Petersen.)

we have in our train and the amount of weight, but the conductor is the man who receives the waybills and where cars come from.

Q. (By Mr. Ryan): Yes. Now, do you know this, though, that some of these Malleys, which are stationed at the roundhouse at Roseville, carry cars from Roseville out of the state of [160]California? Do you know that of your own knowledge?

A. Yes.

Q. Yes. All right. Now, let us get down to the accident.

The Court: This Bowman Turn trip that you speak of, that is the trip, the local trip that starts at Roseville and goes to Bowman and then returns, or vice versa?

The Witness: The Bowman Turn is called such because between Bowman and Roseville cars are picked up, delivered and spotted, the engine and the engine crew and the train crew goes on to Colfax. They stay there over night and make the return trip the next day to Roseville.

The Court: Is the purpose of these trips to pick up produce and bring it back to Roseville and deliver a shipment from Roseville to Bowman?

The Witness: On the trip up usually deliver empty cars and merchandise; on the trip back you take loaded cars.

The Court: Bring it back to Roseville?

The Witness: And empty cars, that is right.

(Testimony of Theadore W. Petersen.)

The Court: And at Roseville they are redistributed and go out on other trains?

The Witness: Yes.

The Court: All right.

Q. (By Mr. Ryan): As I understand it from your testimony that the refers that are picked up and brought that are picked up and brought into Roseville contain California fruit and vegetables?

A. That is right, from Lumis and Rockland and various other places.

Q. Yes. And then this California fruit and vegetables they are brought in on these cars and remade into other trains that go all over the system, is that right?

Mr. Dunne: That is objected to, without being—without foundation.

Q. (By Mr. Ryan): Do you know that?

Mr. Dunne: Without foundation, doesn't know where——

The Court: Read the question.

(Question read by the reporter.)

The Court: Well, I suppose we always take it for granted in California we do send our fruit all over, but I suppose this witness has no specific knowledge of it. However, I don't suppose that would be too serious.

Mr. Ryan: I don't think so.

Q. Now, getting down to the accident. The evening of August the 11th, 1950, did you see Roger Libbey in roundhouse No. 2 at Roseville?

(Testimony of Theadore W. Petersen.)

A. Yes.

Q. And on that night were you a hostler?

A. I was working as a hostler, yes.

Q. Incidentally, counsel said something in his statement about the difference between an inside hostler and an outside hostler. Do they have that distinction at the Roseville roundhouse? [162]

A. No.

Q. I see. In other words, do you act as both an inside and outside hostler?

A. Well, only those who are qualified for both do. Myself, I am not qualified as an outside hostler.

Q. But you that day, were you supposed to move cars right from the roundhouse to the various preparatory tracks where train crews would pick them up?

A. Just the engine.

Q. That is what I mean, the engine.

A. Yes, just one preparatory track at each end.

Q. Then as I understand it you were qualified to move an engine both inside the roundhouse and outside the roundhouse?

A. The term inside hostler means any engine can be moved on any roundhouse track, and an outside hostler moves an engine on a main line or on a yard track.

Q. I see. Is the preparatory track where you were going to put this engine 2795, is that a roundhouse track?

A. That is a roundhouse track, yes.

Q. While you were acting as a hostler you say you saw Libbey in the roundhouse?

(Testimony of Theadore W. Petersen.)

A. That is right.

Q. Did you know Libbey before?

A. Yes, I did.

Q. And before you saw him in the roundhouse that night do [163] know that he was working for the Southern Pacific Company?

Mr. Dunne: That is objected to, objected to as a conclusion.

Mr. Ryan: Withdraw that.

Q. Before you saw him did you know that he was a student fireman? A. No.

Q. And did you have any conversation with Mr. Libbey when you met him that night? A. Yes.

Q. Please tell us what the conversation was?

A. I just asked him what he was doing. He told me he was a student fireman, that he was taking his two shifts in the roundhouse, going around with the firelighters, said that it was his second shift. I believe I made the statement that he would be all done after that and he could make his road trips, or start his yard trips.

Q. Did he get on that locomotive with you?

A. Yes, I was going after the locomotive when I saw him.

Q. What did you say to him about getting on the locomotive?

A. I asked him if he was busy right at the time and he wasn't. I said, "Well, I am going to move 2795 out." More or less he took it for granted and we both got on the engine at about the same time.

Q. I see. Now, incidentally had you had experi-



(Testimony of Theadore W. Petersen.)

ence before with [164] student firemen there at the roundhouse?

A. I have had experience with student firemen, I have had them on the road with me on several engine trips, road trips. As far as in the roundhouse, why, they are not under my jurisdiction.

Q. Now, can you state whether or not it was customary for them to learn all they could about their job?

Mr. Dunne: That is objected to, too indefinite.

The Court: Yes.

Mr. Dunne: With what we are concerned with here.

The Court: I guess we can assume that anyhow.

Mr. Ryan: Yes.

Q. All right. Anyway, after you got on the locomotive where did you go? I mean, where did you sit, did you stand, or what did you do?

A. I sat down on the engineer's seat box.

Q. I see, and was the front of the locomotive headed into the roundhouse? A. Yes.

Q. And where did Libbey go?

A. To the left side, fireman's seat box.

Q. All right. Now, before getting on this locomotive did you look it over a little bit?

A. Yes.

Q. For instance, did you first find out whether there were any chains on it? [165] A. Yes.

Q. And were there any chains on it?

A. There was, yes. There is on all those parked in the roundhouse.



(Testimony of Theadore W. Petersen.)

Q. Did you remove the chains? A. Yes.

Q. And when you got on the cab did you notice whether the fire was lit on the engine?

A. There was a fire in the engine.

Q. Yes. Did you observe whether the fire door was open or shut?

A. The fire door was propped open with a sand scoop.

Q. I see. How far open was the fire door? Could you do it this way? If it is full open, it is full, or half open, or three-quarters or one-quarter, whatever it was. How far open was it?

A. About three and a half inch gap around the fire door.

Q. And when you are talking about the fire door being opened you are not referring to the little peep hole, but the whole door?

A. The whole door was open, yes.

Q. And it was held open by means of this sand scoop, is that correct? A. That is correct.

Q. How long an instrument was the sand [166] scoop?

A. The shortest—the way it was propped to open, why, it would be held open about three and a half inches. The sand scoop itself is eight to nine inches long, perhaps longer.

Q. That was propped so that the door couldn't close, is that correct? A. That is right.

Q. Now, when you got on the engine what is the first valve you move, or what is the first lever or valve that you move?

(Testimony of Theadore W. Petersen.)

A. You open the air pump valve.

Q. The air pump valve? A. That's right.

Q. I show you a picture and I will ask you if that is a fair representation of the various instruments that are in front of the engineer on the engineer's side on the 27 Hundred type locomotive?

A. It is, yes.

Q. Yes.

Mr. Ryan: All right, I offer this in evidence, your Honor, as our next exhibit.

The Clerk: Plaintiff's Exhibit No. 13 introduced and filed in evidence.

(Whereupon the photograph above referred to, marked Plaintiff's Exhibit No. 13, was received in evidence.)

Q. (By Mr. Ryan): Now, you said that you open up what valve, Mr. Petersen? [167]

A. Open the air pump valve. You can take it from there.

Q. All right. When you open the air pump valve what does that do?

A. That is what supplies air for your brakes and your reversing lever.

Q. I see, so that you would be able to stop if you had to? A. Yes.

Q. All right. What is the next thing that you did then?

A. Have to wait until your main reservoir pressure reaches one hundred and ten pounds. That is on your gauge here.

(Testimony of Theadore W. Petersen.)

Q. Did you do that? A. Yes.

Q. And then what did you do?

A. Then you have to check your reversing lever, which is this lever here.

Q. You are indicating—I will mark that with a one so that the jury can see it, one with a circle around it. That is on the right-hand side of the picture. That is your reversing lever. Did you pull that toward you?

A. Pull it toward you to go into reverse, shove it away to go forward.

Q. Now, after you had the reversing lever in position for a reverse movement then what is the next thing that you did? A. Ring the bell.

Q. Well, yes, but—— [168]

A. Got to ring that bell.

Q. After you ring the bell what do you do?

A. Then you open your throttle easy.

Q. And this great big long lever is a throttle?

A. That is right.

Q. When you pull that forward, towards you, does that open it up?

A. You want to pull it open easy, though, pull towards you easy.

Q. I will mark a two on that to show the starting lever.

Mr. Ryan: May I pass this to the jury?

The Court: You can hold it up and show it to them, save time.

Mr. Ryan: Oh, yes.

(Exhibiting photograph to the jurors.)

(Testimony of Theadore W. Petersen.)

The lower corner you see the reverse lever, that sets it in reverse. This great big long lever is the throttle, draw that towards you and that sends steam into the cylinders to operate the wheels, doesn't it?      A. That's right.

Mr. Ryan: My finger is pointing to the reverse lever. You pull that towards you, it puts it in reverse and you see the great big lever, that is the throttle and you move that and that starts it going.

Q. All right. Now, please tell his Honor and the jury what [169] happened when you pulled the throttle and started to move?

A. When you—when I opened the throttle on that particular engine it momentarily took the artificial draft from the firebox causing a momentary explosion inside the firebox. Fire and gas just came out of the door, filled the cab with smoke, and from there on I didn't see anything.

Q. Now, from the way the firebox was opened did this fire and gas come out on your side of the cab or the fireman's side of the cab?

A. Came out on the fireman's side.

Q. What happened then when you noticed this fire and gas come out of the firebox? Could you see Libbey for the smoke or anything?

A. No, couldn't see anything.

Q. You mean the smoke was so thick on the fireman's side——

A. It completely filled the cab, the smoke and the gas completely filled the cab.



(Testimony of Theadore W. Petersen.)

Q. Couldn't look across the cab and see who was there? A. That's right.

Q. All right. Do you know what happened to Libbey? A. No, I don't.

Q. What was the first thing that you knew that Libbey was not in the cab any longer?

A. Well, knowing Libbey I figured that he got scared and I wanted to find out if he got burned, so I hollered over to him. [170] He didn't answer.

Q. That is the first indication you had that he was no longer in the cab? A. That is right.

Q. What did you do when he didn't answer your call?

A. Well, I had already stopped the engine, so I went to look. I heard him holler as I got off the seat box.

Q. I see. You mean, when you heard him holler his holler didn't come from the cab, but from the outside of the cab? A. That is right.

Q. How far did the engine move altogether?

A. I would say ten to twelve feet.

Q. Yes. Then did you get out of the cab on your side?

A. No, I got out of the fireman's side, after I pulled the valve and put the fire out.

Q. Pardon me?

A. After I put the fire out.

Q. I see. You put the fire out completely in the firebox? A. That is right.

Q. And you got out on the fireman's side?

A. That is right.



(Testimony of Theadore W. Petersen.)

Q. Did you see Libbey?

A. Yes, he was on the floor.

Q. Incidentally, how far would you estimate that it was from the sill of the window of the fireman's side down to the floor [171] of the roundhouse?

A. A rough guess I would say twelve to fifteen feet.

Q. And what is the floor made of in that roundhouse?      A. Concrete.

Q. Concrete floor. Now, let me ask you this: On the date of the accident were you familiar with the rules and regulations of the Southern Pacific Company for the firing and handling of locomotives?      A. Yes.

Q. And I will show you, call your attention to Rule 62H under the heading of General Instructions, and wish you would read that first before you answer my question.

A. You want me to read it out loud?

Q. No, you read—you are familiar with that Rule?      A. Yes.

Q. Was that Rule 62H, was that in effect at the time of this accident? I mean, it was one of the rules of the Company as of that date?

Mr. Dunne: Just a minute; let him answer, was it in effect, that was the question.

The Witness: No, it was not.

Mr. Ryan: When did it go out of effect?

A. Wait a minute, correction—correction. The Rule, sure was in effect; sure it was. You got me——

(Testimony of Theadore W. Petersen.)

Mr. Ryan: Almost got something there, [172] Arthur.

The Witness: You got me backwards there.

Mr. Ryan: I would like to read this Rule into evidence, your Honor, reading as follows, Rule 62H, of the Rules and Information for the Firing and Handling of Locomotives for the Southern Pacific Company: "Fire door must be securely latched when starting a fire and at all times when locomotive is under fire, except as provided by Rules No. 63, 102, and 170J," which I don't believe are pertinent here.

Q. Now, I also show you Rule 80 and I wish you would read that and tell me if you knew that Rule and if that was in effect at the time of this accident? [173] A. Yes.

Mr. Ryan: All right. Now I would like to read that into evidence, your Honor. Rule 80 is under the heading, "Duties of Hostlers," and it is as follows:

"Hostlers will be held responsible for condition of locomotives under their care while moving them in and out of engine house or on designated tracks. Water level in boiler must be checked by hostlers in accordance with Rule 101."

Q. Then I call your attention to Rule 81(i) under the heading of "Method of Firing Up Oil Burning Locomotives Not Under Steam," and I will ask you if you knew that rule, and if that was in

(Testimony of Theadore W. Petersen.)

effect on the day of the accident (handing to witness)?      A. Yes.

Mr. Ryan: All right, I will read that into evidence, your Honor.

Mr. Dunne: Well, that is objected to as incompetent, irrelevant and immaterial. This was lighting fires; this locomotive was already under fire.

Mr. Ryan: Yes, but our complaint charges negligence or if it isn't charged, I want to amend it to conform to the proof, in the way the fire was lit when the men left the firebox door open at that time, too.

Mr. Dunne: Well, that was an hour before. There is no cause or relationship there as to this accident. This fire [174] was burning.

The Court: What is the number of the rule?

Mr. Ryan: 61(i): Would you like to see it?

(Handing book to Clerk who then handed it to the Court.)

The Court: I don't see the applicability of it, Mr. Ryan.

Mr. Ryan: All right. Well——

The Court: It is something that has to do with the manner in which the fire lighters should operate.

Mr. Ryan: Yes. In other words, I am charging negligence in the way the fire lighters lit the fire in this particular engine, because they went away leaving the fire door open, and that act of negligence continued right up to the moment of the accident.

The Court: Well, of course this only applies to

(Testimony of Theadore W. Petersen.)

the manner in which the door was to be kept latched when they started the fire.

Mr. Ryan: Well, perhaps. I don't know.

The Court: I don't see that that necessarily would be helpful here, because there is no evidence as to how the fire was lighted in this particular engine.

Mr. Ryan: I see what you mean, yes, your Honor. And Rule 129; I wonder if I can read this, if you think it is pertinent, without going back to this witness?

Mr. Dunne: You can read any of them if I don't have any [175] objection. I would like to look at it first.

Mr. Ryan: All right, would you take a look at 129, please?

Mr. Dunne: I have no objection.

Mr. Ryan: All right. Rule 129 I will read into evidence:

"Fire door should be kept closed and latched while locomotive is on the road or under fire. When making observations through fire door, guard against the outflash of flame that may follow ignition in case fire should go out by having blower on strong enough to create a draft that will remove all gases from the fire-box."

Q. (By Mr. Ryan): Now, Mr. Petersen, when you went up to Mr. Libbey on the ground, did you observe his condition?      A. Yes, I did.



(Testimony of Theadore W. Petersen.)

Q. And what did you notice about him?

A. The main thing I noticed was his right leg was broken above the knee.

Q. And you could see that with your own eyes, could you?

A. It was a compound fracture; you could see the bone sticking up.

Q. I see. And what did you do when you found him there in that condition?

A. Myself and several other roundhouse employees put him on a stretcher.

Q. I see. Put him on a stretcher and where did you take [176] him?

A. He was taken to the Emergency Southern Pacific Hospital.

Q. Right in the company's yard at Roseville?

A. Yes.

Q. And you took him there, did you?

A. No. I did not go with him.

Mr. Ryan: I see. You may cross-examine.

### Cross-Examination

By Mr. Dunne:

Q. Mr. Petersen, let me straighten that one thing first. I first understood you to say that at Roseville there was no distinction between inside and outside hostlers, and then I understood you to say that you were not qualified as an outside hostler?

A. That's right.



(Testimony of Theadore W. Petersen.)

Q. Now an inside hostler is a man who is qualified to move a locomotive on the roundhouse tracks?

A. That's right.

Q. And an outside hostler is a man who is qualified, when necessary, to take a locomotive out onto the working tracks, the switch tracks, or the main line?

A. That's right.

Q. Now as a matter of fact, the outside hostler gets extra pay for that, doesn't he?

A. Yes.

Q. And an outside hostler, when he goes what you call [177] outside, takes a locomotive outside under, onto the working tracks, always has another man with him?

A. That's right.

Q. Inside the roundhouse you move locomotives by yourselves, and work by yourselves?

A. (Nodding in the affirmative.)

Q. Is that correct?

A. That's right.

Q. So that at Roseville there was such a distinction?

A. There is no outside and inside hostlers there, no.

Q. There are no outside hostlers there?

A. No. There's no outside hostling jobs there; there are outside hostlers there, but there are no outside hostling jobs.

Q. I see what you mean. There are no jobs, which, as a regular course, in the regular course in hostling, take a man outside the roundhouse?

A. No.

Q. If an emergency should arise, however, then

(Testimony of Theadore W. Petersen.)

a qualified man would take the engine out as a hostler?      A. That's right.

Q. I see. So that when you say there's no distinction, you mean there were no regular jobs that have that?

A. That's right. I didn't make myself clear.

Q. And again, so that we be clear on this, you first qualify [178] as a fireman, is that correct, when you start in firing? The first thing was to qualify as a fireman?      A. Yes, sir.

Q. Then after you worked as a fireman for awhile, you qualified to handle an engine?

A. That is after you have been in six months actual service; not six months seniority, but six months actual service. Then you must qualify for inside hostling.

Q. At that time, then, you qualify as an inside hostler to handle engines?      A. That's right.

Q. Then from that, you go on to qualify as an outside hostler, and then eventually as an engineer?

A. That's right.

Q. Then you work as an engineer or a fireman, as your seniority permits?      A. That's right.

Q. Had you, before the time of this accident, actually worked as a fireman on road jobs out of Roseville?      A. Yes.

Q. And you had worked over to Sparks and return?      A. Yes.

Q. Now it is part of the job of a fireman to take water into a locomotive, isn't it?

(Testimony of Theadore W. Petersen.)

A. Yes. [179]

Q. And also to take oil?

A. At some places.

Q. And to do that, you have to climb up on the tender?      A. That's right.

Q. Open the manholes or open the receiving hole for the oil?      A. Yes.

Q. In other words, first to take water, you open the manholes?      A. That's right.

Q. Then with a hook, you pull the water column over and take water?      A. That's right.

Q. That is part of the fireman's job, to climb up the front of the locomotive and change the markers, isn't it?      A. That's right.

Q. And also to change the indicators?

A. Right.

Q. And then climb up on the rear of the tender and change the markers and put up markers when the locomotive is running light?

A. Light, that's right.

Q. Would you tell us what the expression "running light" means?

A. Any engine that is running without a train and is displaying markers and signals. [180]

Q. And when a locomotive is running light and there is any occasion to throw switches, who does that?      A. That is the fireman's job.

Q. If a locomotive is running light and there is occasion to flag under Rule 99, who does that?

A. The fireman.

(Testimony of Theadore W. Petersen.)

Q. Did you ever work in helper's service on the Sacramento Division?      A. Yes, sir.

Q. Would you tell, because I used that expression earlier, will you tell the jury what helper's service means?

A. Helper's service is helping any first class passenger train or any express train or any freight train over a grade that the engine, that the road engine is not capable of pulling.

Q. That is, it is an extra engine that is put on to the train?

A. It is an extra engine and crew.

Q. And in helper's service, the helper engine helps up to the top of the grade?

A. To the top of the grade, and cuts out of the train there.

Q. Now you and I understand that expression "cuts out," but the jury may not. What do you mean by "cutting out of the train"?

A. At Norden, California, is the summit of the grade. The engine there leaves the train, it is turned around and [181] goes back light to Roseville.

Q. There is also a helper's service from Truckee up to Northern, isn't there?      A. That's right.

Q. Now on the evening of this accident, Mr. Petersen, please correct me if I am wrong, because I am going to use the form of leading questions. If I misstate anything, correct me, please. You didn't know that Libbey was around the roundhouse until you saw him shortly before this accident?

A. No, I didn't.



(Testimony of Theadore W. Petersen.)

Q. And you came up to him and asked him, that is, when you asked him what he was doing around there; that was the first time you had seen him around the roundhouse?

A. That was the first time.

Q. And he then told you that he was a student fireman?

A. Yes.

Q. You then told him that you were going to move the 2795, is that correct?

A. That's right.

Q. Did you ask him to come with you?

A. Not directly.

Q. You simply told him that you were going to do this, what you were going to do, and then you went off to do it, is that correct?

A. Well, he came along with me, like I said before; he and [182] I have known one another for quite some time.

Q. However, you knew that he was coming along with you, there was no question about that?

A. Yes, I did.

Q. Now had the fire lighters finished with their locomotive, with that locomotive?

A. Yes, the engine was ready to go out of the roundhouse. Everyone was completed with it.

Q. As a matter of custom and practice in handling locomotives and moving them, the hostler doesn't move them until all of the other roundhouse people have finished with them, isn't that right?

A. Yes, that's right.



(Testimony of Theadore W. Petersen.)

Q. And he doesn't move it until they all get off?

A. No.

Q. You say "no"; you mean——

A. Sometimes they will still be on there when the engine is moved. It is common practice.

Q. That is, machinists? A. Machinists.

Q. Boilermakers?

A. Boilermakers or their helpers; electricians—they may be changing light bulbs and stuff of that sort.

Q. Or men who are still continuing to service the locomotive? [183] A. That's right.

Q. As a matter of fact, on this particular night, were you going to take the 2795 up to the sandhouse? A. That's right.

Q. Now where was the sandhouse located?

A. That is at the top end of the roundhouse.

Q. But it is still within the tracks that are part of the roundhouse?

A. Still within the roundhouse area, yes.

Q. And that was for the purpose of servicing it and putting sand aboard?

A. Putting sand aboard, taking water and oil.

Q. And this isn't directly connected with this lawsuit, but to fill it out, what is the purpose of taking sand aboard a locomotive?

A. That is to keep the engine drivers from slipping on the rails and causing the train to break in two.

(Testimony of Theadore W. Petersen.)

Q. In other words, sand is used in ordinary running of a locomotive to assist in stopping and breaking it?

A. That's right; and it is also used in cleaning the flues of the engine.

Q. Now as long as you mentioned that, and we have talked about a sand scoop——

A. That is where the sand——

Q. The flues—well, the fire is in the firebox at the back [184] end of the boiler?

A. That's right.

Q. The boiler head comes into the locomotive and the firebox is below that?      A. That's right.

Q. Then from the firebox there are a series of openings, oh, perhaps two inches, two and a quarter inches in diameter that go through the boiler to the smokebox in the front?

A. (Nodding head in the affirmative.)

Q. Is that correct?      A. That's correct.

Q. And the fire from the firebox in the rear, with proper draft, is drawn up and then goes through those flues to the smokebox in front, and then eventually out the stack in front?

A. (Nodding in the affirmative.)

Q. Now you have to answer, Mr. Petersen, because the Reporter has to get your answer, you see, and he can't watch the nod of your head.

A. Yes, all right.

Q. Now those flues in through there, through the boiler, will get dirty, and filled up with carbon?

A. That's right.

(Testimony of Theadore W. Petersen.)

Q. And the manner of cleaning them out is when the locomotive is working steam heavily, so that there is a heavy draft, [185] you just take a scoop of sand and toss it in the firebox?

A. Well, yes—through the peephole.

Q. Then the draft pulls it through the flues and scours out the flues?      A. That's right.

Q. That is known as "sanding an engine"?

A. That's right.

Q. And for those of us who have seen locomotives running along the line, when you suddenly see a lot of black smoke, coming out, that means the fireman is sanding the engine?

A. That's right.

Q. And this scoop that we have talked about is the scoop that is used to throw that sand in?

A. To throw that sand in the firebox.

Q. Do you know what a pettycoat pipe is?

A. Pardon.

Q. Well, I may have to put it the other way around first. What is a blower?

A. A blower is an artificial draft for your firebox. It clears the gases and smoke and helps put your fire through the flues we were just speaking of.

Q. It is used to create a draft for the fire?

A. That's right, artificially.

Q. Now where does it actually blow? Does it blow—does the blower create the draft by blowing in the firebox at the [186] rear of the boiler, or in the smokebox at the front?      A. (Hesitating.)

(Testimony of Theadore W. Petersen.)

Q. If you can't answer these questions, don't do it.

A. Let's see. I believe the blower blows from the back.

Q. Are you sure about that?

A. No, I am not.

Q. Well, do you happen to know where the draft comes from when the locomotive is working steam?

A. Comes up through the sides.

Q. Comes from the smokebox, doesn't it, through the nozzle in the smokebox?

A. A lot of it does, but I believe there's some comes up from the sides, too, isn't there?

Q. Well, I believe we had better get that from the machinist or the foreman; I don't want to press you beyond your limit on that, Mr. Petersen.

When you got on the engine at the time of this accident, got on there, did this engine have a fire burning in her then?      A. Yes.

Q. And steam up?      A. Steam up.

Q. Do you remember what your steam pressure was at that time?

A. It was a full head of steam. [187]

Q. About 200 pounds?      A. 200 pounds, 210.

Q. She would move, then, without the necessity of changing the fire?      A. That's right.

Q. And you moved her without changing fire, didn't you?      A. I did.

Q. So that the only thing that you did was to make sure you had air pressure for your brakes?

A. (Nodding in the affirmative.)



(Testimony of Theadore W. Petersen.)

Q. And so that your air pressure would work your power driven reverser? A. That's right.

Q. And put your reverser in position for your backward move? A. That's right.

Q. And ringing the bell and doing other things that were necessary; but so far as the movement of the locomotive is concerned, the handling of the steam and the fire, the only thing you did was to open up your throttle after she was down in the corner, is that right? A. That's right.

Q. Now I have fallen into an expression. I said she was "down in the corner." That means your reverser was all the way down for your reverse movement? [188] A. That's right.

Q. And that is the position you put it in when you start out on a reverse move?

A. That's right.

Mr. Dunne: I have no further questions.

Mr. Ryan: I have no further questions.

The Court: That's all.

Mr. Ryan: Oh, yes, I have just one. Pardon me.

### Redirect Examination

By Mr. Ryan:

Q. What was the pay of the fireman——

Mr. Dunne: That is objected to as incompetent, irrelevant and immaterial and without foundation.

Mr. Ryan: Well, your Honor, I don't know if the question——

Mr. Dunne: It is purely speculative.



(Testimony of Theadore W. Petersen.)

Mr. Ryan: I don't think it is speculative. It is a question to be argued as to what his potential earning capacity was.

Mr. Dunne: It is purely speculative as to whether this man would ever have qualified.

Mr. Ryan: I know, but the jury may find out as a finding that he would have.

The Court: I don't see how I could allow a finding like that to stand, because it would be speculative. Because this young man may never have become a fireman.

Mr. Ryan: On the other hand, he may have become one, [189] too, had it not been for this accident.

The Court: That makes it speculative, because we don't know the answer.

Mr. Ryan: As Justice Murphy said in one case, there is a measure of speculation in all cases, but we have to draw inferences.

The Court: I think you cannot, in a suit for damages, recover for something that is not capable of a degree of ascertainment.

Mr. Ryan: Very well.

The Court: You have to be able to ascertain it on some reasonable basis.

Mr. Ryan: I have no further questions.

The Court: That's all.

(Witness excused.)

Mr. Ryan: Now, your Honor, I will rest in about a moment. At this time I offer into evidence,

to read into evidence, the Insurance Commission's 1941 standard mortality table showing that the average expectancy of life of a person of the age of 27 years is 40.36 years. I also offer to read into evidence that the present value of an annuity of \$1 a year for a period of 40 years, discounted at 3 per cent, is \$23.11.

Mr. Dunne: I have no objection to that, if I can read in at the same time, so we get them together—— [190]

The Court: You want to use a different rate of interest?

Mr. Dunne: Yes. Three and a half per cent would be 21.35. Four per cent would be 19.8, and at four and a half per cent, 18.40. Five per cent is 17——

Mr. Ryan: I am going to object to five per cent, your Honor. Under the reasoning of the *Southern Pacific vs. Guthrie*, which you might remember, Mr. Dunne——

Mr. Dunne: Very well.

Mr. Ryan: And I object on the ground that the Court there approved of the three per cent figure, and I submit that an inexperienced person, that is, inexperienced in finance, would not be required to go out and get investments that would pay more than four and a half per cent. That would be speculative—an inexperienced financier—to attempt to do that.

Mr. Dunne: I will take a ruling, if your Honor please. I want to read the five per cent figure.

The Court: You can read the five per cent. I

Mr. Ryan: Well, we stopped there. think if we got to that point in the case, that I would be inclined to tell the jury that, without any evidence, it would be reasonable to take a three per cent rate.

Mr. Dunne: Well, five per cent figure would be 17.16.

Mr. Ryan: Okay. And with that, your Honor, plaintiff rests. [191]

The Court: Well, I suppose counsel may have some matters to present?

Mr. Dunne: Yes, we have.

Mr. Ryan: Yes, sir, I have, too.

The Court: I will excuse the jury. It is near the afternoon recess time anyhow. The jury may take a brief recess at this time, and the record will show that the Court will remain in session. You may take the jury out.

(Whereupon the jury left the courtroom and the following proceedings were had outside their presence.)

Mr. Dunne: Now, if your Honor please, I want to make a motion for a non-suit or to dismiss; I never know what to call it anymore under the Federal Rules. I think probably it is a motion to dismiss, as to the first cause of action. That is the Boiler Inspection Act cause of action, claiming a defect in the locomotive. There isn't the slightest evidence that this locomotive was in any way defective or not fit for proper service in any respect. I don't pretend to quote the exact language of the

statute, but it is generally that it is fit for service in which it is put, without unnecessary injury to life or limb.

Now certainly the very farthest that any of the cases have gone, and there is no Boiler Act case on the subject, is that the test of the boiler case Act is probably slightly different. In the Myers case, which was a hand brake case, [192] the test is a brake that actually works. They have said you make a case when you show either a specific defect in the brake or that, when properly used, the brake didn't function according to its design and construction. Now the Boiler Act doesn't go that far. It simply says, "safe to be used without unnecessary danger to life and limb."

But in this particular case, the only thing that is suggested of anything that was wrong is that the fire came up out of the firebox door. Counsel has put in evidence here the specific rule, the firebox door should be shut. It is without dispute that this firebox door was open. Now if that evidence means anything and points to anything at all, the only thing that it can point to is improper use of this locomotive in such a way that it would cause fire to come out of the firebox door. Now that is the only thing we have, and in view of the fact that the only evidence is to use, according to the plaintiff's case, evidence of improper use, there isn't any basis on which, in this case, a claim can be made that there was any violation of the Boiler Inspection Act, or that this locomotive specifically would have spit or exploded fire into the cab of this loco-



tive if the firebox door had been closed and latched. And as far as that is concerned, I am perfectly willing to submit that matter upon that statement.

Now the second matter, which I don't know whether it is [193] appropriate at this time or should be ruled on, but I want to renew again the offer of defendant's Exhibit A. That, your Honor may recall, is this form of application to observe the operation of locomotives, cars and trains. It is the one in which that——

The Court: Yes, I understand.

Mr. Dunne: You understand that. Now of course the question arises as to whether or not the provision as to assumption of risk would be valid. As I suggested to your Honor, if it is determined conclusively that this man was an employee and the Act applies, then that is obviously not good under Section 5.

The Court: I don't see that there is really any point to that, Mr. Dunne, because to admit it would require a holding that the Act does not apply, and if the Act does not apply, then of course the defendant is not liable. So isn't that the [194] situation?

Mr. Dunne: But isn't there a question of fact for the jury to determine whether this man was employed?

The Court: Well, if the jury decides that he was——

Mr. Dunne: Employed——

The Court: ——an employee, then this would not be applicable.



Mr. Dunne: That's right.

The Court: But if the jury decides that he was not an employee, then the verdict would have to be for the defendant.

Mr. Dunne: For the defendant anyway.

The Court: So I don't see how that——

Mr. Ryan: I don't think that is true, though, your Honor.

The Court: Beg pardon?

Mr. Ryan: I don't think that what your Honor says is true, that if the Act doesn't apply, the verdict would have to be for the defendant. I think that whether or not—of course, I contend that the Federal Employees Liability Act applies. But if he doesn't he is an invitee, and they have to use ordinary care.

The Court: But you can't maintain an action under the Federal Employers Liability Act, involving an invitee, because you have to have the employer-employee relationship under the Act. All that this judge did in the case that you cited was, he held that those facts amounted to an employee-employer relationship; the fact that there was a control by the employer [195] of the manner in which the employee or the plaintiff did what he did, and they got the benefit of it. He held that under those circumstances, an apprentice or student fireman was an employee, and therefore the Act applied.

Mr. Ryan: That is the case, yes; but I mean, even if he wasn't and just assume this for the sake of argument. Assume that he couldn't be classified

tive if the firebox door had been closed and latched. And as far as that is concerned, I am perfectly willing to submit that matter upon that statement.

Now the second matter, which I don't know whether it is [193] appropriate at this time or should be ruled on, but I want to renew again the offer of defendant's Exhibit A. That, your Honor may recall, is this form of application to observe the operation of locomotives, cars and trains. It is the one in which that——

The Court: Yes, I understand.

Mr. Dunne: You understand that. Now of course the question arises as to whether or not the provision as to assumption of risk would be valid. As I suggested to your Honor, if it is determined conclusively that this man was an employee and the Act applies, then that is obviously not good under Section 5.

The Court: I don't see that there is really any point to that, Mr. Dunne, because to admit it would require a holding that the Act does not apply, and if the Act does not apply, then of course the defendant is not liable. So isn't that the [194] situation?

Mr. Dunne: But isn't there a question of fact for the jury to determine whether this man was employed?

The Court: Well, if the jury decides that he was——

Mr. Dunne: Employed——

The Court: ——an employee, then this would not be applicable.

Mr. Dunne: That's right.

The Court: But if the jury decides that he was not an employee, then the verdict would have to be for the defendant.

Mr. Dunne: For the defendant anyway.

The Court: So I don't see how that——

Mr. Ryan: I don't think that is true, though, your Honor.

The Court: Beg pardon?

Mr. Ryan: I don't think that what your Honor says is true, that if the Act doesn't apply, the verdict would have to be for the defendant. I think that whether or not—of course, I contend that the Federal Employees Liability Act applies. But if he doesn't he is an invitee, and they have to use ordinary care.

The Court: But you can't maintain an action under the Federal Employers Liability Act, involving an invitee, because you have to have the employer-employee relationship under the Act. All that this judge did in the case that you cited was, he held that those facts amounted to an employee-employer relationship; the fact that there was a control by the employer [195] of the manner in which the employee or the plaintiff did what he did, and they got the benefit of it. He held that under those circumstances, an apprentice or student fireman was an employee, and therefore the Act applied.

Mr. Ryan: That is the case, yes; but I mean, even if he wasn't and just assume this for the sake of argument. Assume that he couldn't be classified

as an employee. Still, in all, while he was learning, the relationship of invitor and invitee would exist, and the invitor-invitee relationship would require ordinary care. It would be a case of common law negligence. The action, whether it was of an F. E. L. A. case or common law case is founded on negligence in either instance.

Mr. Dunne: The jurisdiction of this Court in this case isn't founded on that. The jurisdiction of this Court is founded only on the theory that this is a Federal Employers Liability case.

Mr. Ryan: It could be found on diversity of citizenship.

Mr. Dunne: But there is no allegation of that.

Mr. Ryan: Oh, yes, there is.

Mr. Dunne: It hasn't been founded on that.

Mr. Ryan: As a citizen of Delaware.

The Court: Yes, but you brought the action and said so in the complaint——

Mr. Ryan: Yes, I want to be brought into that act if I can, but I was just answering the statement your Honor made a moment [196] ago, that if he wasn't an employee, then the verdict would have to be for the defendant. I don't agree with that statement.

The Court: Why not?

Mr. Ryan: Because, as I said, if he was not an employee and if he was learning, learning his job, and they sent him up there in the first place, the relationship of invitor and invitee, under ordinary common law would exist. Then an invitor——



The Court: Well, under those conditions you couldn't rely on a Boiler Inspection Act.

Mr. Ryan: Oh, of course not. But I am talking about the second count.

The Court: No. 1. No. 2, you couldn't rely upon the Federal Employers Liability Act.

Mr. Ryan: No, but negligence would be the basis of the action, just as it would under the Federal Employers Liability Act. I mean, maybe this is a little academic, but——

The Court: Well, I don't think you could be permitted to go to judgment on a theory of common law negligence, because the case was brought here in this Court on the theory of the Federal Employers Liability statute.

Mr. Ryan: That is in extremis. I mean, if there was no other way, I could still have that to fall back on. But I don't think we need that in this case.

Mr. Dunne: What Mr. Ryan is saying—I want to point this out so there will be no misunderstanding about it—is that [197] if he has any intention of relying on common law negligence, is that this is admissible as an assumption of risk agreement, as a defense to any common law negligence, because the agreement is valid under the Francis case.

Mr. Ryan: Yes, but an assumption of risk can even, under common law, not apply—it wouldn't apply if the other side was guilty of negligence.

Mr. Dunne: Oh yes, that is the Francis case; United States Supreme Court has squarely passed on that.



The Court: Yes.

Mr. Ryan: I think this is academic, though.

The Court: But this case, in its present status, I can't hold that this is anything more than a Federal Employers Liability case.

Mr. Ryan: I am afraid that is an academic point that I raised.

The Court: If the plaintiff were not an employee, then the action fails. And if he was an employee, then under the Federal Employers Liability Act, Section 55, I think it is—45 USC 55, then this agreement would be invalid.

Mr. Dunne: That's right. If he were an employee. There is no question about that, your Honor.

Now then, in view of that, I offer separately and severally as a distinct offer, the heading on this document, the first paragraph, excepting the last word, "and," which indicates that [198] it carries on to something else. And then the last two lines, which is the place and the date, and then the line for the signature.

Now that is an independent order; if your Honor will look it, you can see it will bear specifically on this question of fact as to whether or not this man is an employee.

The Court (Examining): You say the last paragraph?

Mr. Ryan: No, just the first paragraph.

Mr. Dunne: Yes, the first paragraph, and then of course, enough to pick it up for the signature and the date.

The Court: Well, I don't think that dissecting the document in that way would amount or would have any meaning, or, inasmuch as there were other documents that were signed and are now in evidence, that fix the conditions and show the purpose of it, show the relationship between the plaintiff and the defendant——

Mr. Dunne: Well, those, I think not, your Honor; there are applications, and only in a remote sense. Now this is a document that is part of the same transaction. It bears on the relationship that the parties bore to each other. In other words, the circumstances under which he was on the premises. In his agreement to the provisions of that first paragraph, the least that can be said of them is that they are one item of fact.

The Court: That I don't agree with you on, but the paragraph has no meaning unless it is a whereas clause, unless it [199] is connected with the purpose and objective of this document, which is for the purpose of waiver of assumption of risk. I don't think you could take out of a document that is intended for that purpose something that applied for a different purpose.

Mr. Dunne: Well then, the whole thing ought to come in with an instruction from your Honor as to when the assumption of risk provision is good and when it is not good; because we can't dissect the facts. It is part of the facts.

The Court: Well, it seems to me that the interests of justice require that this document be not

admitted into evidence. I don't see that it serves any useful purpose, because as I say, it is determined that the plaintiff was covered by the Act, that the Act did apply—if that is determined, then the document itself wouldn't be invalid under Section 55 of the Act. And if, of course, it is determined that he was not an employee, and the Act doesn't apply, then the Court would have to instruct for a verdict for the defendant in the case, irrespective of Mr. Ryan's contention that he might still proceed in a common law action. So for that reason, I think——

Mr. Dunne: So there will be no mistake on the record as to my offer, I am offering it now both as a whole and as to that first paragraph, as a separate offer, as one of the items of fact going to show what the relationship between the plaintiff and the defendant was at the time he was in the roundhouse.

The Court: Yes, I understand the full purpose of the offer, [200] and I will hold that for neither purpose is the document admissible—neither in whole or in part.

Now what have you got say——

Mr. Dunne: I beg your pardon.

The Court: No, did you have another matter to present?

Mr. Dunne: Yes, I did.

The Court: Suppose you present that, then.

Mr. Dunne: I presented the matter as to the Boiler Inspection Act. Now the next is as to the Federal Employers Liability Act, and as to whether

or not the plaintiff has made a *prima facie* case for the application of that Act in either of the two necessary aspects: One, to show that he was an employee and the other to show that if an employee, then any part of his duties were in interstate commerce or in furtherance of interstate commerce.

Now first, for a non-suit or a dismissal as to that charge, or that claim, on the ground that there is no evidence that he was at any time an employee, or that he performed any service within the meaning of that Watkins case. And further amplifying that, that the only evidence in this record is that his instructions were to go around with the fire-lighters and keep his eyes open and see what he could. Then he departed from that and moved out, if he did anything at all under the jurisdiction, the unwarranted jurisdiction, the fireman who himself has testified now that he had no jurisdiction over student firemen around the [201] roundhouse. In other words, that this man departed from the thing that he was instructed to do. And on one of the instructions I have cited to your Honor just such a case. The facts were a little more extreme than in this case. That was the case of a student fireman who, instead of going up into the locomotive went back into the caboose and was in the caboose at the time he was killed in a rear-end collision. Recognizing the general rule that a student fireman performing services are employees, the Court held that it was only while they were



performing those services, and than when he departed, he lost that status as employee.

The Court: Wouldn't that be rather, though, technical in this case? Because it appears, not too clearly, perhaps even somewhat vaguely, in the evidence that the next step would have been for him to have ridden on the locomotive anyhow.

Mr. Dunne: In the yard, your Honor—in the yard; he would have gone out with a regular crew in the yard. Here he was getting on a locomotive moving around the roundhouse when he was still supposed to be doing his shift in the roundhouse, and to be with the firelighters. Now I concede, if your Honor please, that in many respects that may look like a somewhat technical distinction, and yet it is seizing on a highly technical conception of employment, if it be seized on at all, that counsel wants to bring themselves within Acts, No. 1, which deprive us of certain common law defenses, that deprive us of [202] the assumption of risk defense, the Federal Employers Liability Act applying; the Federal Employers Liability Act, applying, contributory negligence is only a defense in litigation. And if by any chance your Honor should say there was a question of fact under the Boiler Inspection Act, there is nothing more highly technical than the fact that we are brought under an Act where we are liable, if there is any defect in the locomotive, no matter how much care we exercise. In other words, these Acts impose such responsibility that unless the requirements of the Act



are laid out, I think we are entitled and justified in taking the position. This man, in other words, to take advantage of these Acts, has to bring himself within them, and he hasn't done it.

Now in addition to that, if your Honor please, and going to the same cause of action, I call your Honor's to the Rock case. There is a further ground; this man is not an employee within the meaning of the Act, because the Rock case applies. This man misrepresented to us facts with respect to his physical condition.

The Court: That is that Minnesota Railroad case?

Mr. Dunne: That's right, against Rock. Facts which would go directly to the matter of his physical condition, his physical fitness for the job as a fireman. And in this case, he has indicated himself that the injuries themselves had some relation to the very fact of the prior condition, because when he [203] went out to the window, he endeavored to save his left leg because he knew that he had an injured left leg. And while he doesn't say that he did it entirely, the fact is, he said, "Yes, consciously I was taking, I wanted to land on both feet, but I wanted to take it on my right leg, because I knew I had an injured left leg." So that it was a matter of fraud that he perpetrated. It was a fraud, that went to the essence of the employer-employee relationship. It was a fraud that deprived us of any choice of taking that kind of a man to be around a roundhouse, where things are

somewhat hazardous. And upon that ground I submit to your Honor that the Rock case applies.

Now your Honor, I think, is aware——

The Court: Wouldn't that be a question of fact for the jury, though? Wouldn't that be a question for the jury as to whether or not that was that type of fraud, and whether or not it had a casual relationship to the accident?

Mr. Dunne: Well, your Honor then is familiar with the other line of cases on that. Because as far as I know, the representations, cases of representation that go a man's physical condition, that they are related to his job, have followed the Rock case except where a man, whatever his condition—and they are usually age cases—has been taken on and has worked a long period of time and is then injured. The great majority of the cases which at least say that it is a question of fact, and then a question of casual relationship, are [204] those in which a man has misrepresented his age. There are those two lines of cases.

Now lastly, as to the application of the Federal Employers Liability Act, the motion is made upon the ground that there is no evidence in this case that anything that this man ever did, that any part of his duties, were in any way related to interstate commerce or the furtherance of interstate commerce. Now in the first place, the most that is shown is that Roseville itself is a terminal at which interstate traffic is handled. It is shown that he has done something around the roundhouse. It is not shown that he had the slightest contact with any power

that was ever used. Now I admit this is rather extreme, because this is the state of the record. It is not shown that he had any connection with any power that had ever been assigned to any job which ever handled any interstate traffic. [205]

The Court: Well, of course, Mr. Peterson testified that this engine was to be used in the bowman——

Mr. Dunne: Bowman turn.

The Court: Bowman turn movement, and of course under these Supreme Court decisions that we have now, why, apparently a Judge isn't expected to search very hard to find a connection between what any employee does in Interstate commerce.

Mr. Dunne: That is quite true.

The Court: Practically told not to make, devote a great deal of energy, by Judge Frankfurter in some of the decisions.

Mr. Dunne: That is true, they have gone quite far in that regard, but in addition to that this man is removed even farther, because there is no evidence that he actually performed any service, a service that he ever actually did, or did anything that was in furtherance of Interstate——

The Court: No doubt, Mr. Dunne, that—of course, he was not engaged in any service in the common acceptance of that term. The Judge in this Watkins case speaks of it as a service in the sense that the training and observation and so forth is part of the preparation of the fireman for duty and

in that sense that it is a service to the railroad company.

Mr. Dunne: I appreciate that there is some language [206] there——

The Court: Some reasoning——

Mr. Dunne: I appreciate there is some such language there, but I think if your Honor would look not only in that case, but the other cases, you will find that the man actually has performed no real service. Now, without looking at my notes, in the Watkins case, my recollection is that the Watkins case he was a yard——

The Court: He was a clerk.

Mr. Dunne: You see, in that case he had performed some actual service. He took the seals on the one side of the cars while the clerk took the seals on the other side of the cars. He actually relieved the clerk of performing that service in the course of learning.

The Court: The first time he had gone out, the clerk said you take this side and I will take this side, and that is when the accident happened.

Mr. Dunne: He actually relieved the clerk in that case.

The Court: It is one of these distinctions that is like the distinction between substance and procedure, sometimes very tenuous and very hard to draw the line. If he was just looking would he be performing a service? Supposing a man, a car inspector, standing off and just looking on. It is rather getting down to rather fine points.



Mr. Dunne: In other words, you have to find out what the [207] job calls for and what he was doing whether he was performing a service. Obviously, with an inspector merely looking he would be performing a service. This man——

The Court: He was learning.

Mr. Dunne: That is what he was doing in this case.

The Court: Except he had testified he had thrown the oil waste and in a couple of instances started the fire, gotten that far in the service, so while it is meager, I suppose it has to be decided on the principal.

Well, I think that the questions that you raise with respect to the second cause of action are practically all matters that the Court would have to submit to the jury, Mr. Dunne. That would be my feeling on that. I would like to hear from Mr. Ryan.

Mr. T. Ryan: Yes, I would like to say one word.

The Court: To see what he has to say about that boiler.

Mr. T. Ryan: I will come to that. If I might say one word that hasn't been mentioned here by either your Honor or Mr. Dunne on the Federal Employers count. This case is very, very similar to the case, that Watkins case. Your Honor will recall when the plaintiff got hurt in that case he had, it is true, gone down one line of cars, the regular clerk went down the other line of cars, they finished that work, then they went over to a shack to get some coffee or something, rest, or doing some-



thing, and the accident [208] happened when they were walking across the yard.

The Court: Happened in another place.

Mr. Ryan: Happened in another place while walking between two sets of cars.

Now, here is something very interesting to bear in mind showing that plaintiff comes within the Act as stated in the Watkins case. You know, under the 39 Amendment to the Act any part of his duties had to do with Interstate Commerce, then he comes within the Act. He doesn't have to be doing a job related to Interstate Commerce at the very moment of the accident. Now, your Honor will recall Libbey's testimony that during the day——

The Court: I don't think——

Mr. Ryan: He lit two fires——

The Court: I don't think we need to take time to argue that. I think that would be a question for the jury at the most.

Mr. Ryan: Very well. Now, your Honor, in regard to the Boiler Inspection Act, counsel didn't think it applied. The reason I wasn't worried about it as I am about another matter as to whether this Act applies or not, counsel stated we didn't show any particular defect in the locomotive. He said that the accident happened——

The Court: He said that, but that wasn't really the purport of Mr. Dunne's argument, though. He called attention [209] to the, I think it is Myers, other cases, where the brake does not function, that

you just show the brake doesn't work. That is sufficient. But here, there is nothing that was shown that had to do with the engine not working, except the fact that somebody left the door open and the fire came out. That has nothing to do with the serviceability of the engine.

Mr. Ryan: Well, here is my answer to that——

The Court: Any more than if a man drops some grease on the engine or does some other act.

Mr. Ryan: This Section 23, which is the Boiler Inspection Act, reads as follows:

Now, leaving that door open rendered the locomotive unsafe, "Without unnecessary peril to life and limb." That made that locomotive unsafe. For instance, in the case of *Lilly vs. The Grand Trunk Railroad*, they held, it went to the United States Supreme Court, held merely because snow fell on the locomotive that there was a violation of the Boiler Inspection Act. That locomotive could work 100 per cent both before and after the accident, but it was dangerous at the [210] moment because snow was on it. I say this is akin to that. This locomotive was dangerous because the door was left open.

Your Honor, that is not the point where I had my doubts. Where I thought the close question where the Act applied was this: The Act says that it only applies when the locomotive is used on the line of the company. In other words, for instance, the Boiler Inspection Act wouldn't apply to mere switching operations.

The Court: Mr. Dunne didn't make that point.

Mr. Ryan: I know, cases that hold that where an engine is being taken out of the roundhouse which is going to be coupled to a train in Interstate Commerce that the Boiler Inspection Act would apply, but my answer to the argument made by Mr. Dunne is that this engine was rendered unsafe because that door was left open. It is just as effectively unsafe as if there were no door there at all.

The Court: You haven't alleged that, you didn't charge that as an element of unsafeness in your complaint.

Mr. Ryan: In the first count——

The Court: No, you said it was unsafe because the fact that the engineer injected oil into it, as I remember it.

Mr. Ryan: Said firebox was in an improper condition and unsafe because oil could not be injected into it, into the said firebox without flashing back into the cab of the locomotive. [211]

The Court: You see, if the door was closed, it would have been a safe condition.

Mr. Ryan: When I get through with answering this argument I will make a motion to amend the complaint to conform to the proof.

The Court: I will allow that amendment, no question about that.

Mr. Ryan: I will say that engine was just as effectively unsafe under the Boiler Inspection Act as if there was no door. Doesn't leaving the door open render the engine unsafe? And no one would

question that the Boiler Inspection Act would apply if there was no door and this flashback came back and injured a man.

I say it is a question of degree only, but all you have to show under the Boiler Inspection Act is that the condition that existed rendered it unsafe for life and limb. This condition did render it unsafe for life and limb.

The Court: Of course, I don't think, Mr. Dunne, it makes very much difference in this case whether the Boiler Inspection cause of action is in or not. There is not as yet, unless something else is to be introduced, any real substance to any claim of contributory negligence except the fact that the young man jumped out of the cab, if that could be considered contributory negligence, and that that being so it doesn't make very much difference which cause of action is [212] proceeded on.

Mr. Dunne: Of course——

The Court: If the case is more substantial the jury would have to pass on——

Mr. Dunne: But there are a number of things, if the case is submitted to the jury, and your Honor has seen it already in the instructions, instructions have to be guarded, they have to be chopped off, they have to be conditioned. We have that. It is not presented to the jury in as easy and clean a way. Your Honor would have to, of course, give the other instructions anyway. Nothing occurs to me as to the difference between the two except on the question of contributory negligence, but it does



make a difference and if the Act doesn't apply I shouldn't have to be bothered with making arguments before I can argue the conduct of the man himself.

Now, certainly there is a remarkable distinction between a locomotive that is defective and a locomotive that is not defective and misused.

The Court: Of course, Mr. Ryan argues it is just as effective as if there were no door. There is some merit to that.

Mr. Dunne: Except this, if your Honor please: There is a marked distinction between an employer who has employed his mechanics, employed his inspectors, gotten his locomotive in perfect shape, and then as it was mishandled by a hostler [213] and an employer who says, "Go ahead and use that locomotive," when he knows it doesn't have a door on it.

I think your Honor will find cases straight through which made a marked distinction between defective equipment and misuse of equipment that is not defective. [214]

The Court: Well, if this were a case that was going to stand or fall on that Boiler Inspection Act I think I would be inclined to give further consideration to it, but at the moment I don't see that there is any real need to give that any further attention. I might be even inclined to suggest to the jury if I were submitting the case at this point, which is the point I have to decide these motions, I would be inclined to say to the jury there isn't



very much substance to any claim of contributory negligence, unless, as I say, the jumping out of the cab window by this young man might be considered as such, and under these circumstances I don't see any great importance to the motion at this stage of the case. It may be that there might be at the end of the case, I don't know.

I think—have you got some witnesses here this afternoon that can go on?

Mr. Dunne: Of course, that is the question I now have to debate. If this motion is denied, then the questions I have to resolve is whether to call any witnesses as to the condition of this locomotive.

The Court: You would have to do that under any condition.

Mr. Dunne: What?

The Court: I say, you would have to do that under any condition.

Mr. Dunne: No, if the—— [215]

The Court: If the boiler inspection cause of action was thrown out?

Mr. Dunne: I am pretty close to the point of being ready to submit the case. I have one or two things that I would have to do. I am not going to argue about what happened on this particular occasion; no particular question about that. I am not going to claim these rules counsel has read here were not in effect. I am not going—I don't see how I can possibly argue to this jury with a straight face that these rules weren't violated. It seems to me they are perfectly plain.

The Court: I think that in fairness at this stage of the case that I should deny the motions. If you feel it is necessary to put on some evidence on that score and you haven't got it here now you can put it on in the morning.

Mr. Dunne: Well, I would like to do that and give consideration to it, suggesting to your Honor on further consideration and on checking the record I may conclude at that phase of the case and to submit it at that point. However, there are one or two things that I can put in this afternoon.

Now, possibly counsel will have some objection to them, but I think that as long as the jury isn't here I might indicate what they are.

The Court: All right. So the record will be clear, the Court will deny the motion to dismiss both causes of action. [216]

Mr. Ryan: Your Honor, I want to make a motion to amend my complaint to conform to the proof, to change the allegations where I said oil was injected into the boiler and to allege negligence in operating the engine with the door open and I will prepare one in writing.

Mr. Dunne: Not necessary to do that. I will make no point at any stage of the proceedings that the evidence that has come in is not within the issues and I will make no point that that issue cannot be passed upon by the jury. I am perfectly satisfied I was not taken by surprise, and we know what happened, and the witness has testified substantially in that regard what I expected him to testify.

Mr. Ryan: Very well.

Mr. Dunne: So that it may be before the Court I want to offer two official publications, one by the United States Government which outlines the Federal Vocational Rehabilitation Service, and the other, a very short one, published by the California State Department of Education, Bureau of Vocational Rehabilitation. They are very short and they are in the form of general statements as to what those services—I don't intend to read them to the jury, but I want them for a foundation for making an argument to the jury as to the facilities open to this young man.

Mr. Ryan: I would make two objections to them. Number one, they are hearsay as to the plaintiff, and number two, [217] they are incompetent, irrelevant and immaterial at this point for this reason: that the evidence conclusively shows that the plaintiff is still undergoing treatment at the Southern Pacific General Hospital, he is not at the point yet up to this period of time that he should go out and try to get vocational rehabilitation.

The Court: I don't think much of that argument. Your own doctor said his state is permanent so far as he can see and nothing more that could be done.

Mr. Ryan: That is true, up to this moment. If you're arguing in the past he should have done it, he is still under medical——

The Court: He is not asking——

Mr. Dunne: Not as to the past.

The Court: That is not Mr. Dunne's point.

Mr. Ryan: As to the future?

The Court: That is right.

Mr. Ryan: Well, let's see——

Mr. Dunne: What is open to this young man.

Mr. Ryan: Well, I object then on the ground it is hearsay. I cannot cross-examine these documents, can't bring out all the facts.

The Court: I suppose it is hearsay.

Mr. Dunne: Except the fact that they are official government representations as to what that [218] service is.

The Court: I think that there has been enough said on the subject to allow counsel to make a fair comment to the jury as to the nature of this service and that there is that opportunity.

Mr. Ryan: I agree with that.

The Court: That the Government maintains services for that purpose. I think that would be perfectly fair comment to make to the jury without the documents.

Mr. Ryan: I think he got that from Dr. Guter-man, I mean, all those things.

Mr. Dunne: So we shan't get into a snarl, won't ask that they be marked—I will ask in that regard to amplify that, that the Court take judicial notice in order that I may comment on the statutes which set up the services.

Mr. Ryan: Under which the services are set up?

The Court: Very well, the Court takes judicial notice of those statutes.

Mr. Dunne: I think that is all I have at the



moment. I will have two rules. I will call counsel's attention to them; one of which bears on this matter of employment, and the other which bears——

The Court: Hadn't you better present that when the jury is here?

Mr. Dunne: Yes, I want to do that, but simply want to ask Mr. Ryan, I assume he will give me the accommodation, if [219] I can read them, if otherwise relevant, Rule 864 of the Transportation Rules, that is, unauthorized persons not to be allowed on moving locomotives.

Mr. Ryan: I don't know it offhand.

Mr. Dunne: You don't want me to bring a witness to prove that——

Mr. Ryan: Absolutely not. I have a book.

Mr. Dunne: And the same thing, I think it is Section 6 or 16 or Article 51 of the Firemen's agreement.

Mr. Ryan: Article 51, got it here?

Mr. Dunne: Yes. It is the 90-day provision. There is a provision under the Fireman's Agreement, if your Honor please, that once these men have passed, taken all their student trips and otherwise qualified, they are hired and go on pay, and then thereafter, Section 16, there is a 90-day period in which we may terminate their services without cause for any reason, and if we don't do it within that 90-day period, then we can terminate only for cause and under the provisions of the Act. I offer it to show that there are three gradations in this matter of permanent employment, the student



status, whatever that may be, temporary status, 90 days, and then permanent status. It is a matter, I think, which probably dresses itself more to your Honor than to the jury. As a practical matter that is what the section is, the Firemen's Agreement. I just wanted to know whether counsel wanted me to [220] call a witness.

Mr. Ryan: You won't have to call anybody to identify, I will admit the Agreement, but still reserve my right——

Mr. Dunne: That is right.

The Court: Now, you wish to call any—have you got someone you wish to put on the witness stand?

Mr. Dunne: I prefer to go on tomorrow morning, your Honor, if I may.

The Court: How much time do you think—can it go to the jury tomorrow, that is what I would like to know.

Mr. Dunne: Tomorrow afternoon?

Mr. Ryan: I think we could complete the argument tomorrow.

Mr. Dunne: Not if I call witnesses on the condition of the locomotive.

The Court: That is all right, you could probably use the morning in testimony, you think?

Mr. Ryan: I will enter into a stipulation to speed that up. I would be willing to admit that if you called the master mechanic—I see you have Mr. Weiste here, I know more or less what his testimony——

Mr. Dunne: I have the foreman.

Mr. Ryan: And the roundhouse foreman, that the only defect——

Mr. Dunne: Put it this way: You only claim a defect under the Boiler Inspection Act in that the door was not [221] closed?

Mr. Ryan: Let me see, I was thinking—I think you have my answer about these explosions and these flare-backs——

The Court: Of course, that is all the evidence was so far.

Mr. Ryan: Yes.

The Court: Nothing to indicate had the door been closed that these flames and smoke would have gotten into the cab.

Mr. Ryan: Yes. I will admit that the only thing defective or unsafe, in the language——

Mr. Dunne: I don't care how——

Mr. Ryan: Is the keeping of the door open, when the thing is being operated.

Mr. Dunne: That stipulation, then, I would not call anybody, your Honor, please. Probably one witness to call in the morning.

The Court: Would that be long?

Mr. Dunne: No, I think not.

Mr. Ryan: The roundhouse foreman?

Mr. Dunne: Yes, your Honor, if I call him, I think his testimony would not take over a half hour.

The Court: Argue the matter in the morning then?

Mr. Dunne: Yes.

Mr. Ryan: Argue in the morning 10 to 10:30,

at least partially argue it. I imagine the last argument would go into [222] the afternoon.

The Court: How much time to argue?

Mr. Dunne: Not a great deal, I don't think; hardly a disputed fact in this case.

Mr. Ryan: Most things are admitted.

The Court: Have you got that witness here today?

Mr. Dunne: No, your Honor, I have not.

Mr. Ryan: How about a half hour?

The Court: Well, I was just a little premature. I think perhaps I better bring the jury in and enter into the stipulation in front of the jury you just made, and then I will dismiss the jury for the day.

Mr. Dunne: Now, how about that Rule 864?

Mr. Ryan: Do you have it with you?

Mr. Dunne: Yes.

Mr. Ryan: Oh, I am going to make an objection. Trying to read this afternoon?

Mr. Dunne: Whenever——

Mr. Ryan: For instance, want to object to this latter sentence, latter part of it says——

The Court: What are you reading, so the record is clear?

Mr. Ryan: Reading now from the Firemen's Agreement that counsel handed me.

The Court: What section? [223]

Mr. Ryan: Section——

Mr. Dunne: 16 of Article 51.

Mr. Ryan: Of Article 51. The last sentence reads as follows:

“When applicant is not notified to the contrary within the time stated, it will be understood that the applicant becomes an accepted employee, but this rule shall not operate to prevent the removal from service of such applicant, if subsequent to the expiration of 90 days it is found that information given by him in his application is false.”

Now, I am going to object to that on the ground that it is incompetent, irrelevant and immaterial and self-serving on several grounds. Number one, he was not a fireman at the time this accident happened, he was a student fireman, and the agreement wouldn't even begin to cover him until such time as he had passed the examination and been accepted by the company as a fireman. Secondly, I say that it is, further, that information given by him in his application is false, even under the law and even under that agreement they couldn't fire him unless that was a material allegation, and I submit that after their own company doctor had accepted him and passed him with knowledge of his injuries and knowledge of his compound fracture in the other leg they would waive any such finding. [224]

The Court: Mr. Dunne, how is the provision of the Firemen's Agreement applicable here? Does it specifically say that it applies to student firemen?

Mr. Dunne: As a matter of fact, your Honor, it does not. The Firemen's Agreement does not apply to student firemen. There have been all sorts of discussions before all sorts of bodies about that,



but it does not. At this time I am not offering it for what counsel seems to be bothered with, I am offering it for the purpose of showing that between a student fireman and a permanent employee there is still an intermediate stage of temporary employment and I say to your Honor that I am calling attention to the existence of this rule because it has—attention has been called to it in some of the cases that have distinguished this question of fraud and have indicated that the man, even though he has passed beyond that 90-day period, that they had——

The Court: The company still has the right to——

Mr. Dunne: That is right.

The Court: Not to complete his employment?

Mr. Dunne: That is right.

The Court: On that ground.

Mr. Dunne: And it is in connection with that that I am offering the rule. [225]

Mr. Ryan: I will object on the ground it doesn't apply to the plaintiff in this case because he was not a fireman and not a party to the agreement.

The Court: I think that the precise provision in this agreement would be subject to Mr. Ryan's objection. The subject matter that you are discussing, however, might be presented in some manner to the jury, but I don't think this rule, that it would be competent to read the rule and agreement that is not applicable.

Mr. Dunne: May Mr. Ryan's reading of the rule be taken as my offer of the rule, then?



The Court: Yes, I will sustain the objection.

Mr. Dunne: 864.

Mr. Ryan: The other one. Well, I am going to object to this rule being read on the ground it is not applicable.

The Court: What rule are you referring to?

Mr. Ryan: Referring to Rule 864 of the Rules and Regulations of the Transportation Department. It reads as follows:

“Persons must not be permitted to ride on an engine or in a baggage, mail or express car without a written order from the proper authority, except employees in the discharge of their duties and those holding transportation endorsed to that effect.”

I submit that is used to keep tramps and unauthorized [226] persons, outside people off the engines and——

Mr. Dunne: Student firemen in the roundhouse.

Mr. Ryan: “Except employees in the discharge of their duties.”

Now, under the Watkins case it holds that the student fireman, while observing, is in the discharge of his duties and that’s what Mr. Libbey was on that engine 4, because he testified that——

The Court: I don’t think you need to labor that. I am inclined to think that the rule is not pertinent, Mr. Dunne, to this matter, because the relationship—it is clear from the document and testimony that that is what the young man was there for, to

make observation. He had to do that by getting on the engine.

Mr. Ryan: Had to do that to light the fires and watch the fire lighters.

Mr. Dunne: I want to make the record clear that our point is that the only evidence in this case is that he was instructed to accompany fire lighters. He had no instructions of any kind to ride on a moving locomotive. There was no evidence that fire lighters ever are on moving locomotives or have any function on moving locomotives. Our position is that until he had finished his two turns in the roundhouse, his only function was to accompany the fire lighters as told and he was going outside of the scope of his instructions, duties, [227] or whatever they may be called, when he got on to an engine to watch an engine to be moved.

Mr. Ryan: The answer is that Libbey's testimony where he said the roundhouse foreman Farrell had told him as follows, and I quote:

“Keep your eyes and ears open and learn everything you can about being a fireman.”

One thing he had to learn about, being a fireman, was how his engine was operated, because indeed it is firemen who act as hostlers in movements.

The Court: Well, I don't think you need to labor the point. I personally doubt that it would have any pertinency here. It is obviously intended to cover other situations than that of a person learning to be a fireman. In and of itself the presence

of the young man as an observer on the engine certainly is innocuous, no matter what stage of the proceeding, of his learning. I would rather think that would be a forced and unfair interpretation.

Mr. Dunne: Of course, it is also a restriction on any authority, any invitation from Petersen offering it in that connection, too.

The Court: I will sustain the objection to that. It has been read into evidence so that——

Mr. Dunne: It has been read in the record.

The Court: Read in the record. [228]

Mr. Dunne: May that reading serve as my offer?

The Court: That may serve as your offer, and I will sustain the objection.

Bring the jury in, Mr. Jones. I will dismiss them for the day, and tomorrow morning we will hear your remaining witness.

Mr. Dunne: I think it will be quite short, your Honor.

The Court: Very well.

Mr. Dunne: I want to amend one instruction, I am not sure I have got all the elements in that.

The Court: Like to take it back?

Mr. Dunne: I would rather leave it and hand the Court a new one. I think it is No. 40.

The Court: No. 40.

Mr. Dunne: It omits the element that we relied on representation. I think to be safe that should be in there.

The Court: Well, would you want to submit something more?

Mr. Dunne: Yes, I will bring it to you in the morning.

(The following proceedings were had in the presence of the jury.)

The Court: Members of the jury, we have been engaged in some discussions of law which I think have resulted in materially shortening the case, although it required you to remain outside and engage in forced conversation with one [229] another for a longer than usual period.

We won't need the jury any more today, and so you will be dismissed a little bit early and we will resume tomorrow morning at ten o'clock. The way the case now shapes itself up the case will be put in your hands for decision some time tomorrow.

Now, I notice that you didn't seem to like that, what is the matter?

A Juror: I have no likes or dislikes, absolutely neutral.

The Court: You indicated that you thought maybe we should have gone on today or something like that?

A Juror: Oh, no.

The Court: Then I misinterpreted it.

All right, members of the jury, please return tomorrow morning at ten o'clock and bear in mind the admonition of the Court.

(Thereupon an adjournment was taken until Wednesday, July 11th, 1951, at 10 o'clock a.m.)



Certificate of Reporter

I (We) Official Reporter(s) and Official Reporter(s) pro tem, certify that the foregoing transcript of 230 pages is a true and correct transcript of the record therein contained as reported by me (us) and thereon reduced to typewriting; to the best of my (our) ability.

/s/ [Illegible]

/s/ R. D. NORTON. [230]

Wednesday, July 11, 1951

The Clerk: Libbey vs. Southern Pacific Company, further trial.

Mr. T. Ryan: Ready, your Honor.

Mr. Dunne: Ready.

The Clerk: Juror No. 10 is absent, sir.

The Court: That is Mrs. Anderson. Juror No. 10 has not arrived. What do you want to do, counsel, wish to proceed with eleven jurors, or wish to make an effort to find out what has happened?

Mr. T. Ryan: Your Honor, as far as the plaintiff is concerned, rather than delay this trial right at the very end of it, I would just as soon go ahead with eleven jurors.

The Court: What do you say?

Mr. Dunne: I would like to make an effort to find out what the reason is, whether it is something of only a matter of a few minutes.

The Court: The Clerk will have to go upstairs



and try to find out on the telephone. He advises me she lives in San Bruno and may have some transportation difficulty.

Mr. Dunne: That's right.

The Court: Well, we will take a brief recess, the Clerk will try to ascertain the reason.

The jurors may remain in the box. [232]

(Short recess.)

(After recess, all Jurors being in the box, the following proceedings were had.)

The Court: Proceed.

Mr. T. Ryan: May it please your Honor, if I may interrupt at this time in order to further simplify the issues in this case, the plaintiff hereby dismisses the count based upon the violation of the Boiler Inspection Act, so this goes to the jury on the simple issue of negligence.

Mr. Dunne: Then that makes it unnecessary for us to state the stipulation that was entered into yesterday.

Mr. T. Ryan: That is right.

Mr. Dunne: Dr. Cress.

WALTER WILLIAM CRESS

called as a witness on behalf of the defendant, sworn:

The Clerk: Please state your full name to the Court and to the jury?

A. Dr. Walter William Cress.

(Testimony of Walter William Cress.)

Direct Examination

By Mr. Dunne:

Q. Doctor, you are a duly licensed physician and surgeon, licensed to practice as such in the State of California? A. Yes, sir.

Q. And how long have you been so licensed, Doctor? A. Thirty-eight years. [233]

Q. Where are you now practicing your profession? A. Sacramento, California.

Q. And how long have you practiced it there?

A. Twenty-seven years.

Q. Do you have some connection with the Southern Pacific Company? A. I do, sir.

Q. And what is that connection, Doctor?

A. I am division surgeon of the Sacramento Division and the examining surgeon for that Division.

Q. And what are the functions of an examining surgeon?

A. Well, we examine all employees in the City of Sacramento in the shops.

Q. That is, applicants for employment?

A. Applicants for employment.

Q. I want to call your attention to a young man who is sitting in the Courtroom here inside the rail, Mr. Libbey. As you look at him, do you recognize him; do you have any personal recollection of him?

A. No, I can't. I examine about twenty or thirty a day and I don't recall him.

Q. Doctor, we have here a record, a writing, which is defendant's Exhibit C in this case. Let me

(Testimony of Walter William Cress.)

show it to you and ask you first just generally as to it, if you recognize that form of paper, if you have seen that type of record before? [234]

A. Yes, sir.

Q. And generally what is it?

A. Well, it is a record of the applicant's examination, physical examination and his answers to the employing officer.

Q. Now, upon what is the second, the third, and the fourth page of that there is some printed material and there is some material in longhand writing, ink writing. Do you recognize that ink writing?

A. Yes, sir.

Q. Whose is it?

A. It is mine.

Q. I want to call your attention particularly to the second page and to this printed part it says: "Skin; scars, ulcers, excessive perspiration, and Vaso-Motor Tone." And under that there is some longhand writing. Whose writing is that?

A. That is mine, sir.

Q. Would you read what is there?

A. "Multiple scars left thigh and slight deformity of left thigh. Result of compound fracture of the femur during early childhood."

Q. Now, Doctor, with respect to that particular writing there, except as the writing itself may refresh your recollection do you have any personal recollection of the incident when you wrote that down? [235]

Mr. T. Ryan: I will object to that on the ground that that calls for the conclusion of the witness in view of his earlier statement that he has no personal

(Testimony of Walter William Cress.)

recollection of Mr. Libbey going there, and also an attempt to impeach what his own witness said in that respect.

The Court: I don't think there is any merit to that. Overruled. He may answer.

A. I don't recall, of course, making this entry here.

Q. (By Mr. Dunne): I am asking you if you, as a matter of your own recollection, with all the cases that you see, if you have any recollection of that particular——

A. Oh, no, sir.

Q. Doctor, with regard to those matters and the way those things are made out, I would like you to tell the jury what the normal routine is, how these things come about and what is done in the normal course of routine?

A. The examination, sir?

Q. Yes.

A. Well, of course, I usually refer to page one, which is the applicant's answers as to what diseases or injuries he has had, and then, of course, after examination I make these entries into this page 2, part 2 of this examination, take his blood pressure. The nurse, my assistant, who is my office nurse, has taken the vision and the hearing, and I do the physical examination part. [236]

Q. I want to call your attention to that particular entry that you read there, Doctor, and ask you whether or not in the course of making out any of these reports you have any recollection of ever having put down an untruthful statement?



(Testimony of Walter William Cress.)

Mr. T. Ryan: Just a moment, I object to that on the ground that it calls for a self-serving declaration on the part of the doctor on the ground that on other matters not connected it is incompetent.

The Court: The form of the question is—the form of the question is, I think, subject to objection. The subject matter may not be, but the form of the question is objectionable. Objection will be sustained.

Q. (By Mr. Dunne): Put it this way, then: Doctor, those matters, or those records are made by you in the course of the ordinary routine of examining these men, are they not?

A. Yes, sir.

Q. And in that ordinary practice, as matters of actual practice, are those records made by you yourself insofar as you make the accurate records?

A. Yes, sir.

Mr. T. Ryan: I move to strike his answer, I object to it on the ground that it is a self-serving speculation.

The Court: Yes, the objection is good, the manner in which it is done, the conclusion as to whether it is truthful or not, that is a conclusion. [237]

Mr. Dunne: What I am asking is a question obviously the Doctor has no personal recollection——

The Court: You may ask, of course, how he gets the information.

Mr. Dunne: That is right.

The Court: But not a conclusion as to whether or not it is accurate.



(Testimony of Walter William Cress.)

Mr. Dunne: Well, I am going to suggest in that regard——

The Court: That would be, of course, a matter of——

Mr. Dunne: Same foundation, lay the same foundation that is laid in the case of books of account and so forth, that in the ordinary course of routine they are kept accurately.

Q. Doctor, aside from the matters that you enter in your record, following his Honor's suggestion, that you enter in your record matters that are there, aside from what you yourself can observe, where do you get the information that is put down on that record?

A. Where do we get the information?

Q. Yes.

A. From the applicant.

Q. From the applicant himself. Do you have, in making those records, Doctor, a regular routine of making notations of men who have service connected disabilities?

Mr. Ryan: Object to that on the ground that it is incompetent, irrelevant and immaterial what he does in the ordinary [238] case. The question is what he did in this particular case, because he might have a rule and vary from it.

The Court: Yes, that may be true, but that would go to the weight of the testimony rather than to its admissibility. Overrule the objection.

Mr. Dunne: May I have the question?

(Question read by the Reporter.)

(Testimony of Walter William Cress.)

A. I do.

Q. (By Mr. Dunne): And what is that routine, Doctor?

Mr. Ryan: May my objection go to the line of questioning without repeating?

The Court: If you are objecting to this question I will overrule it.

Mr. T. Ryan: Yes, on the same grounds as before.

Q. (By Mr. Dunne): What is that routine, Doctor?

A. Well, if they are servicemen I usually attempt to ascertain if they have had any injuries or disabilities while in the service. And if they have, what the percentage of disability rating they have. It gives me an idea as to whether we should accept them or not, and a man who has one hundred per cent disability rating we frequently reject him.

Q. And in the course of that routine if you find that there has been a service-connected disability with a rating, is it ordinary routine to enter it on the record? A. Yes. [239]

Mr. T. Ryan: Objected to on the ground that it is leading.

Q. (By Mr. Dunne): Now, Doctor, you have been doing this work for a great many years, have you not? A. About twenty-eight years.

Q. I want to assume this: I want to assume that in 1950, in August of 1950, a man came to you who is applying for employment as a fireman and that at

(Testimony of Walter William Cress.)

that time he had a disability service-connected as the result of a war wound, a piece of shrapnel having gone into his left leg at about the middle third, resulted in a fracture of the femur; that he had been hospitalized for that for something over a year; that it had healed with a slight deformity; that it had left him with scars; that it had left him with a slight restriction of motion of the left hip; that it had left him with a slight restriction of motion of the left ankle; that it had left him with a restriction of motion of the left knee; that thereafter he had fallen and fractured the patella of the left knee, the left kneecap, and had been hospitalized for that; and that in 1950 he was suffering from restriction of motion of his left knee so that he didn't have full bending of it, and some atrophy of the left leg and a slight restriction of motion in the hip and in the left ankle; that that was, the injury had been received in 1943, there had been a long recuperation, something over a year of hospitalization, and then some gradual improvement in [240] the condition.

Now, examining a man for a fireman, if you had known those facts, would you have passed that man for a fireman?

Mr. T. Ryan: Just a moment. I make two objections to that: Number 1, that he is asking for a self-serving declaration on the part of one of their defendants, he is attempting to impeach the Doctor's own medical examination of the man, knowing about the fracture and observing with his own eyes the

(Testimony of Walter William Cress.)

wounds made by the shrapnel; secondly, and entirely aside from that objection, as a second objection, as far as the hypothetical question is concerned, I object to it on the ground that he has left out some very vital factors which would have affected the doctor's medical decision, to wit: That the man had improved to such an extent that the United States Government, through the Veterans Administration, had reduced his disability from 70 per cent to 35 per cent to 10 per cent and he had only had a 10 per cent disability at the time of this physical examination whereby he was getting \$15 a month from the Government; and thirdly, he left out this vital factor which would play an important part in the doctor's opinion, the fact that the man, prior to seeking to employment with the Southern Pacific Company, had been doing hard physical labor in the nature of working eight hours a day digging ditches with a pick and shovel; that he had worked in a logging camp doing heavy work, that he had done stevedore work in the nature of [241] loading and unloading cargo from both freight cars and boats, and that he had worked both as a wiper in the engine room of vessels where he was required to work in very cramped quarters and that he had worked as an ordinary seaman on vessels, and that he was able to walk with the disability in that left leg as much as seven miles a day.

Mr. Dunne: I will add those factors to the question.



(Testimony of Walter William Cress.)

Q. Doctor, did you hear what Mr. Ryan said?

A. Yes, sir.

Q. I will add those, too, to the factors he has accurately stated what some of the testimony is on that regard, take all those factors into consideration and with it in mind that this man, applying for the job of fireman, would you have passed that man?

Mr. T. Ryan: Just a moment. I have my other objection, the first one, which was apart from the second one, that it calls for a self-serving declaration on the part of the Southern Pacific Company, and also an attempt to impeach his own physical examination which shows on the face of it that he saw the injury that the man had and knew of his compound fracture.

The Court: Well, I think that this is not the field, Mr. Dunne, for the expert testimony. The casual relation of this man to the employment is a factual question for the jury to decide. I don't see that it is possible for expert testimony on the part of the examining doctor; it would result in opinion and a [242] conclusion which would be self-serving and would decide the matter rather than leaving it as a question of fact.

I will sustain the objection.

Mr. Dunne: Respectfully note the exception.

Q. Now, Doctor, assuming that same set of facts—if your Honor please, I don't want to persist after your Honor has made the ruling, but I do want to make a record.



(Testimony of Walter William Cress.)

The Court: Yes.

Mr. Dunne: And there is, although the objection hasn't been put on the ground—I would like to put another question on that same set of facts.

Mr. T. Ryan: Your Honor, ask the witness to wait until I make the objection, then, before he answers?

The Court: All right.

Q. (By Mr. Dunne): Now, Doctor, I want to assume that same set of facts and on that same set of facts put this question to you: Would such a man meet the standards of physical condition that were set for acceptance as a student fireman and for employment as a fireman?

Mr. T. Ryan: Just a moment, object to that on the ground that that calls for the conclusion and opinion of the witness and calls for a self-serving declaration and also serves as an attempt to impeach his own medical examination when he had that information about his injuries, and thirdly, on the ground that the answer would usurp the province of the jury in this case. [243]

The Court: Well, for the same reasons I will sustain the objection.

Mr. Dunne: I have no further questions.

I want, in this connection, if your Honor please, to make an offer of proof. Of course normally I should do it with the witness on the stand. I assume it would not be proper to make it in the presence of the jury, but I offer to make the offer now and at the appropriate time I will enlarge on it.

(Testimony of Walter William Cress.)

The Court: You may do that. I don't think it is necessary to preserve your record, because it is in the nature of questions.

Mr. Dunne: I think that is perhaps true, but I would like to complete the record.

### Cross-Examination

By Mr. T. Ryan:

Q. Doctor, you say that you are division surgeon for the Sacramento Division of the Southern Pacific Company?      A. Yes, sir.

Q. And also examining surgeon for the Southern Pacific Company, is that right?      A. Yes, sir.

Q. Now, how long have you been employed by the Southern Pacific Company?

A. Approximately 28 years. [244]

Q. Now, when I say "employed" do you get a regular salary from the Southern Pacific Company?

A. Yes, sir.

Q. Is that a monthly salary?      A. Yes, sir.

Q. And have you been getting that for 28 years?

A. Yes, sir.

Q. Now, you say that you examined some twenty to thirty men a day on an average for the railroad?

A. Yes, sir.

Q. How long do you usually take in one of these examinations?

A. Well, as I say, the office nurse does part of the examination. I should say it takes us about an average of twenty minutes per person.

(Testimony of Walter William Cress.)

Q. Yes. You make a pretty thorough examination? A. Yes, sir.

Q. I notice from your record there you examined all parts of the body from the head to the feet, don't you? A. Yes, sir.

Q. And you stripped the man so you can see what he looks like?

A. Not entirely. We strip them so we can get a pretty good idea of their physical condition.

Q. I mean you examine all parts of his body don't you? A. Yes, sir. [245]

Q. And you examine all his organs, too; I notice you examine heart, lungs, liver, kidney, and so forth? A. Yes.

Q. Yes. Take the blood pressure?

A. Yes, sir.

Q. Incidentally, for a man 26 or 27 years of age, would a blood pressure of 110 over 76 be normal? A. Yes, sir.

Q. That would indicate that as far as his circulatory system was concerned, he was in pretty good health, wouldn't it?

A. His blood pressure was all right, yes, sir?

Q. Yes. And if his heart and arteries were negative that would mean they were normal?

A. Yes, sir.

Q. And if his lungs were negative, that would mean they were normal?

A. Not necessarily. Of course, you understand this is not a complete examination.

Q. Well——

(Testimony of Walter William Cress.)

A. Frequently overlook things, you know.

Q. Well——

A. It is a crude examination at the best. It is—we don't use an x-ray for the lungs, or only in certain employees do we use the x-ray.

Q. Let me put it this way: If you wrote down in your ink [246] handwriting that the lungs were negative, that means as far as you are concerned, it was normal?

A. That is right.

Q. When you say abdominal area, which would include scars, hernia or masses, would mean that he had none of those things?

A. None that we found.

Q. And you looked for them, right?

A. Yes.

Q. And when you say that his genital-urinary tract were negative, that would mean as far as your examination was concerned, that area of his body was normal?

A. That's right.

Q. Now, under the heading of skin, scars, ulcers, excessive perspiration and Vaso-Motor Tone, you wrote down: "Multiple scars of the left thigh." Stop there a moment. Of course, not having any recollection at the present time of Mr. Libbey, you don't recall where on his left thigh those scars were, do you?

A. No, sir.

Q. And you have no recollection as to whether there was such a wound that would enter in one part of his leg and come out the other; you don't remember that do you?

A. No, sir.



(Testimony of Walter William Cress.)

Q. And then when you write down here that he had a slight deformity of the left thigh, can you tell us now what that [247] deformity was that you found in his left thigh? A. No, sir.

Q. You don't remember that at all, right?

A. No, sir.

Q. Now, then, when you say that this—these scars of the left thigh and this deformity of the left thigh was the result of a compound fracture of the femur, you don't recall now what part of the femur that compound fracture was of, do you?

A. About the middle third.

Q. You remember that?

A. No, I don't remember it, no, sir.

Q. Why do you say that, the middle third?

A. Well, I——

Q. Here is what you wrote, show you the paper. Is there anything there to indicate what part of the femur it was? A. No, sir.

Q. All right. And you don't recall?

A. No, I don't recall.

Q. You, however, when you wrote down on this report that he had a compound fracture of the femur, you mean that the big bone between the knee and the hip actually broke through the skin at one time or another?

A. The skin was broken with the bone exposed, yes, sir.

Q. So you knew then when you accepted his application, which you did, did you not? I show you



(Testimony of Walter William Cress.)

part 3, "Is applicant [248] accepted, rejected, or referred?", and you encircled "accepted"?

A. That is right.

Q. That means he was accepted after you knew he had suffered a compound fracture, is that right?

A. That's right.

Q. And also after you knew that he had such a compound fracture with these wounds, entering one part of the leg and coming out the other, correct?

A. Correct.

Mr. T. Ryan: That is all, Doctor.

### Redirect Examination

By Mr. Dunne:

Q. Of course, that only takes up part of what you knew, Doctor, so let's take that entry and read the rest of it, follow the line of questions that Mr. Ryan put to you, "Resulting compound fracture femur during early childhood." That would also indicate to you that whatever this condition was he had overcome it and had gone through a good many years of it without it bothering him?

A. That's right.

Q. And if you had such a history, Doctor, having found out that a man had had a compound fracture of the femur in early childhood and had learned then that after that he had been accepted by the Marines, served with the Marines on active duty in a combat area, would such a history affect your

(Testimony of Walter William Cress.)

opinion as to the results of any such fracture in early [249] childhood?

Mr. T. Ryan: Object on the grounds that it calls for the opinion and conclusion of the witness, as a self-serving declaration on his part, attempting to go against his own observations of the man in his physical examination, and on the ground that it usurps the province of the jury, speculative, and also not proper redirect.

The Court: Well, I still think, Mr. Dunne, that is a jury question, rather than an opinion testimony of the witness as an expert as to his opinion. It is for someone else to say that was of the nature that would affect his opinion rather than for him to say, because at best it could, it would only be in the hypothetical field.

I will sustain the objection.

Q. (By Mr. Dunne): And, Doctor, in arriving at a conclusion, forming an opinion as to the physical condition of the man and whether he should be accepted, this is as a matter of medical practice, is the history which is given to you by the man a matter which you, as a doctor, takes into consideration in arriving at your conclusion?

Mr. T. Ryan: Object to that on the ground that that is incompetent, irrelevant and immaterial.

The Court: Of course, that is a general question, he hasn't asked it with reference to this case.

Mr. T. Ryan: No.

The Court: I see no objection, no basis for the objection, [250] and I will overrule the objection.

(Testimony of Walter William Cress.)

The Witness: Question? I didn't get the question.

The Court: All doctors take into account in making a diagnosis the history of the case.

The Witness: Yes, sir.

The Court: We all know that.

Q. (By Dr. Dunne): And, Doctor, as a medical man, when a history is given to you and it is given to you untruthfully can you be misled as well as anybody else?

Mr. T. Ryan: Object to that, that is leading and suggestive.

The Court: Yes.

Mr. T. Ryan: Calls for the conclusion of the witness.

Mr. Dunne: I have no further questions.

The Court: Sustained.

Mr. T. Ryan: I have no further questions.

The Court: That is all.

(Witness excused.)

Mr. Dunne: Now, it is almost time for recess. I would suggest that your Honor excuse the Jury, I will complete the record by making an offer of proof, and then I shall rest.

The Court: I will give the jury a brief recess at this time, because we have some matters to take up. The jury may take a ten minute recess. Please bear in mind the admonition of the Court. [251]

(Jurors retire from the Courtroom.)

Mr. Dunne: Now, if your Honor please, to complete the record, and in respect to those first questions that were asked, which your Honor sustained the objections to, of course, my position is, in asking those questions, to complete the proof, my proving the ultimate fact that there are certain standards of physical condition that a man, such as described in the hypothetical question, would not meet those standards, if known, and applied by the doctor, and that in fact the defendant was misled by these misrepresentations, because had the doctor been told, then under the standard as set forth and under the practice of the doctor, such a man would not have been accepted as a fireman, for the purpose of showing reliance and being misled by the misrepresentations.

Also suggest to your Honor that I have one instruction for you, and I have it here. And I have nothing more to offer, if your Honor please, and the defendant rests at this time.

The Court: Both sides completed their evidence, then?

Mr. T. Ryan: Yes, your Honor.

The Court: The Rules provide that the Court will advise counsel before the argument——

Mr. Dunne: May I, before your Honor does that, I appreciate that this must be done, and having offered evidence under the Rules I probably could waive my earlier motion to dismiss. As I did not, I now renew it at the conclusion of all the [252] evidence so that at this time I move for a directed verdict, this first count having been dismissed, that



is aside now, I move for a directed verdict as to the second count on all the grounds stated yesterday in my motion to dismiss with respect to that second count and may it be stipulated that I need not repeat all of it?

Mr. T. Ryan: Yes, I will so stipulate.

The Court: The Court will deny the motion on the same grounds on which I based the denial of the motion at the conclusion of the plaintiff's case.

The form of instructions that have been proposed by both sides, that is, in the aggregate by both sides, in view of the purpose of the rule, which is to advise counsel concerning the Court's instructions to better enable them to make their arguments to the jury, the Court will merely state at this time that in the precise form submitted all of the instructions are rejected.

The Court, however, will give in substance many of the proposed instructions by both sides.

It will give the usual instruction as to the province of the Court and Jury, the weight to be given to the testimony of witnesses, the standards that apply in that regard, the rule as to the burden of proof. It will give the jury then in substance the provisions of the Federal Employers Liability Act and will advise the jury of the degree of proof required by [253] the plaintiff. It will advise the jury that the doctrine of assumption of risk will not apply, that contributory negligence, if there is contributory negligence, is only a pro tanto division, that is, if the jury believes that there has been con-



contributory negligence under the definition to be given, that the doctrine of comparative negligence applies and the amount of any award if they find there has been negligence, is reduced in proportion in the amount of contributory negligence, if any.

The Court will advise the jury as to the requirement that proof as to interstate commerce, what degree of proof is required, and leave it to the jury to say as to whether or not there was interstate commerce here. It will advise the jury as to the—that it is necessary to have, regardless of employer and employee, in order to sustain a cause of action under the Federal Employers Liability Act, and that one of the questions of fact for the jury to determine is whether or not, according to the statutes which the Court will give the jury, there was a relationship of employer and employee at this time, what those standards will be. Then in substance the standards that are used by Judge Hughes in the Watkins case, the degree of control by the railroad company over the activities of the plaintiff and whether or not those activities were for the benefit of the railroad company.

The Court will leave to the jury the question as to whether or not there was or was not any fraudulent representation [254] in the obtaining of employment, and if there was, whether or not it was of such a nature as to substantiate the right of the plaintiff to secure this status of student fireman.

The Court will give a resume to the jury very briefly of the respective contentions of the parties and the issue involved.

As to damages it will give the usual instructions as to the measure of damages applicable here, if the jury should conclude that the plaintiff is entitled to a verdict.

Tell the Jury that it may take into account the usual factors as to the nature of the injury, whether or not it is permanent, and the elements that go into fixing damages, such as pain and suffering, and loss of earnings in the future, advise the jury that they may take into account the life expectancy of the plaintiff, and that so far as loss of earnings is concerned the total must be limited to the present value of the loss of future earnings based upon earnings in the past and upon their investment at the reasonable rate of interest, which the Court will suggest is approximately three per cent, that the jury cannot take into account any earnings that might be speculative as to the future, but only the loss of earnings based upon the earning capacity of the plaintiff in the past.

I will also tell the jury that they may not take into account any injury that the plaintiff may have already had, [255] would not be fair to charge the railroad company with any injury which the plaintiff suffered and still had as a result of his service for the United States in the Navy or in the Merchant Marine or by virtue of any prior accident that he may have had, that those are matters that any disability as a result of those injuries is not compensable in this proceeding in the event of a verdict for the plaintiff.

I think that what I have said in general is suffi-

cient to advise counsel as to the general nature of the instructions. Objections to the instructions may be made at the conclusion of the instructions.

Mr. T. Ryan: Your Honor going to instruct that they may take into consideration the reduced purchasing power of the dollar?

The Court: I notice that you cited the Guthrie case there, but I don't think that I gave that instruction in the Guthrie case, did I?

Mr. T. Ryan: I don't recall, all the way through——

The Court: Some time ago in previous cases I have given such an instruction, and the California Supreme Court seems to have considered it valid, but in later cases I concluded that where an award was based upon, in part upon earnings, earning capacity, that it would be improper to give that instruction because then the judge would be inferring that whatever award the jury might give based upon prior earning capacity it should [256] be increased by some amount out of relationship to the value of the dollar. That, I think, would be improper, irrespective of whether other Courts have held that way or not. That is not a proper instruction when any part of an award is based upon earnings.

Mr. T. Ryan: That wouldn't preclude us from arguing that to the jury, though, that is, on pain and suffering they are going to give, give damages for that, I have a right to comment that the dollar today isn't worth nearly as much as in the thirties and the verdict should be higher for that reason.

The Court: I don't think any jury should be



instructed as to base their verdict upon any verdict that has been given in the past in any case. They are to assume that the award is the present value of the loss of future earnings, plus any damages that might be ascertainable due to pain and suffering.

Mr. T. Ryan: Yes.

The Court: And the general nature of the injury. I will not, Mr. Ryan, give any instruction to the jury which tells the jury in effect that they can give more than some jury gave in some prior case at a certain point of time, because I think that is especially bad law. While I have the utmost respect for courts which have given that instruction, I could never see it had any validity because it is an invitation to disregard the evidence in the case.

Mr. T. Ryan: Your Honor may not conclude that as a matter [257] of law, but as a matter of fact and what the jury can do from their experience in human life and the world we are living in, not living in a vacuum, I believe I, as an attorney, at least have——

The Court: I don't think it is necessary for any attorney to argue that because the tenor of verdicts today is certainly in keeping with the standards of today and my experience has been, and I can only speak from experience, that juries today render their verdicts in accordance with the standards that pertain today and not the standards that pertain to prior years. And I have never seen any complaint in that regard. I think these other decisions in that regard are the decisions, and I say it most politely,

are the decisions of theorists and you have to see, to sit in actual contact in the trial courts with the functioning of juries to see how they function, and if I thought it was in the interest of justice to call attention of the jury to the fact I would certainly do so. But I don't think the juries today need any admonition in that regard.

I say that to you very frankly and I don't think it is a fair comment to make to the jury because the jury renders its verdict in the atmosphere and against the background of the evidence of the particular case and in the light of their own knowledge of the status of the world, economically and otherwise today, and I don't think that there is any need in the interest of justice to make such a statement to the jury and I [258] think it might also lead to error, might cause a judge to feel, after the verdict came in, that the verdict is the result not of the evidence in the case but of some theory that would indicate that the jury is going beyond the bounds of the evidence in the case and which might be just grounds for asking the court to interpose with respect to the verdict after it is rendered.

Perhaps I have taken a lot of time on this, but I feel that this is not a proper comment.

Mr. T. Ryan: Very well.

The Court: However, I would like to see this case go to the jury and I don't intend to suggest, counsel, that you should limit yourself, but I think it should go to the jury in the early afternoon; how much time do you think you require for argument?

Mr. T. Ryan: My brother, who is going to make



the opening argument, says he will be about a half hour.

The Court: How much time do you think you would like to have to take, Mr. Dunne? Whatever time is to be taken should be fairly the same.

Mr. Dunne: Very, very seldom do I argue one of these cases over an hour, but I do know that sometimes you get started and you take more time than you think. My guess would be that I would take about forty minutes.

The Court: Well, suppose that both sides try to get through in less than an hour, if you can, and I will ask the jury [259] to come back at 1:30.

Mr. T. Ryan: Fine.

The Court: Submit it to them a little bit earlier, give them enough time to complete the matter.

Take a recess.

(Short recess.)

(Whereupon counsel for plaintiff and defendant presented argument to the jury after which the Court instructed the jury as follows:)

The Court: Members of the jury, since this is the first experience of most of you in serving as jurors I should like to take just a moment to tell you somewhat generally about your duties as jurors.

Traditionally our juries are given the power and function of deciding the questions of fact in every case, be it criminal or civil, and in this particular case it is your job to decide the question of fact. Here you will have to decide whether or not the

defendant railroad company is liable to the plaintiff and if it is, the amount of the damages. That, in general, is your function—that is the question of fact you will have to decide. The judge doesn't take any part in that. That is exclusively your function.

The judge, on the other hand, has the duty of telling you what the law is so that you may be helped in arriving at the just result, and you have to assume, rightly or wrongly, [260] that the judge knows what he is talking about when he tells you what the law is.

You should not come into the jury box in this case or in any case with any preconceived notion on social or economic questions. You don't divide money up between people because you have some pet theory that you had in mind. You come here and you listen to the evidence and you decide the case on the basis of that evidence, applying the principles of the law which the judge gives you.

You are not to indulge in any sympathy or in any prejudice in arriving at your decision. And so it is that while the judge and the jury have a little different function to perform, we are, in a manner of speaking, a sort of a team because it is our common objective to accomplish justice. While you are here you are an arm of the court just as I am as a judge, and our sole purpose is to endeavor to further the interests of justice and to make our courts stand for something in our system of government and society.

Now, I have said to you that you shouldn't indulge in any sympathy or prejudice. You shouldn't be

prejudiced against the railroad company because it is a railroad company, or a corporation. I called that to your attention when you were impanelled. In like manner you are not to render a verdict for the plaintiff because of the natural sympathy you may have for him. This young man performed very valiant service for our [261] country in a very extraordinary military maneuver in Guadalcanal. For that he, as well as thousands and perhaps hundreds of thousands of others, who have served, should have our respect and our thanks. However, much as that is a natural call upon our sympathy, it is not the basis for any award in a civil action between private citizens because the defendant in this case cannot be held to be responsible in any way for the injuries which he suffered in the service of his country. And it cannot be held responsible individually any more than Mrs. Erb or myself could be held responsible individually in dollars and cents for the damage which the young man had in the war.

I emphasize that somewhat because I feel myself in actual sympathy for this young man who served his country, and I would have to school myself most carefully if I were acting as the trier of fact instead of yourselves as jurors to be sure that I was meting out exact justice in performing my duty by abiding by my oath just as you do abide by your oaths as jurors.

Now, there are some general rules of law that apply in all civil cases. I will just give you a few of them, we don't need to burden you with too many of them.

You have the right to determine the weight you wish to attach to the testimony of the witnesses who have testified. There isn't very much for you to resolve here so far as the weight of testimony is concerned. There has been no substantial matter upon which there is a conflict of testimony except in one [262] phase of the matter to which I will refer in a moment. But generally speaking yours is the power to determine how much weight you are to give to the testimony of witnesses. If you think a witness has testified falsely in any material respect you are justified in rejecting all the witness' testimony.

In this kind of a case, a civil case, the law imposes upon the plaintiff the burden of proof. That means that he must prove his case by a preponderance of the evidence.

That, in turn, means that the testimony offered on behalf of the plaintiff must have more convincing weight and effect than that which appears to be in favor of the other side, of the defendant in the case. And if the evidence viewed in that way appears to be equally balanced between the two parties then the conclusion is proper that the plaintiff has failed to sustain the burden of proving the case by a preponderance of the evidence.

You have to disregard any testimony that has been stricken by the Court or any testimony of a witness when an objection has been sustained to the question which elicits the answer.

The attorneys have argued this case to you. They



have that right and it is, in fact, their duty to do so. But if you should find any discrepancy in the testimony, as you recall it as having been given by the witnesses, and the testimony as it is stated to have been the testimony by the attorneys in their argument, you should disregard the attorney's statement in that [263] regard and place reliance only upon the testimony that you heard produced here in the courtroom.

Can you hear me?

A Juror: Any objection to using the mike? I couldn't hear very well on account of the noise.

The Court: Have you been able to hear me?

A Juror: I can hear all right, but the noise on the street——

The Court: We have got this to contend with on account of their building some additional Courtrooms and the hammers always go at the wrong time.

In this particular case, members of the Jury, the facts are not particularly in dispute. The suit is brought under the Federal Employers Liability Act I mentioned to you when you were impanelled and that that was a Federal Statute that applied to railroad companies when they were engaged in interstate commerce. In effect it extends to employees of railroad companies the right to maintain an action against the railroad company if it appears that an employee has been injured as a result in whole or in part of the negligence of any of the officers or any employee of the carrier, that is, the



railroad company, or by reason of any defect or insufficiency due to negligence in its cars, engines, appliances, machinery, tracks, and so forth.

Now, in this case it has been admitted by counsel, and it [264] is proper for the Court to make a comment to you, that the leaving of the door of the engine box open was an act of negligence. And if an employee of the railroad company, while the railroad and the employee were engaged in interstate commerce, was injured as a result of that, as the proximate result of that negligence, then there would be liability upon the part of the railroad company.

The railroad employee under this statute does not assume the risk of any injury that may come to him as a result of negligence.

It may be, and it sometimes happens, that in some cases there is what is called contributory negligence on the part of the employee. That is some act or omission on the part of the employee which go along with and contribute with the negligence of the railroad company concurring in the damage. That, however, is not a bar to a recovery in a suit under the Statute. And if it should appear to you in this case that the plaintiff was negligent, as well as the railroad company, then you would have to determine how much of the total negligence was attributable to the railroad company and how much was attributable to the plaintiff. And the plaintiff would in such case only be entitled to recover that proportion of the total negligence which the negligence of

the railroad company bears to the total negligence.

I can illustrate that to you in this way: Let us assume [265] for the sake of argument that in this case, while I am not indicating that that is the fact at all, that 50 per cent of the negligence was the negligence of the railroad company and 50 per cent was the negligence of the employee. I take the figures 50 per cent for illustrative purposes because they are about as near neutral as I can find two figures. In that event if you found that the railroad company was liable and that it was negligent, in that event you would determine the total amount of damages and then you would only award fifty per cent of that amount to the plaintiff because that is the theory of comparative negligence that is applied in cases where contributory negligence is established under this law.

Now, that is the general situation that applies in a case of a suit brought under the Federal Employers Liability Act.

In this case it is necessary for you to determine two other matters before you may make a finding of liability upon the part of the railroad company. The first of these is that it must be established that the plaintiff was an employee within the meaning of the Federal Employers Liability Statute at the time of this accident. This Federal law, Federal Employers Liability Act, does not itself define what the word "employee" or "employer" means as used in the Act and the Courts have from time to time given definitions. The principal one that has been

given is that it is the traditional relationship of employer and employee that is meant. This plaintiff was a [266] student fireman. The evidence showed he was learning, going to learn to be a fireman and he was given permission to perform certain duties and to engage in certain activities by the railroad company as a prelude to his possible employment by the railroad company.

Now, the test that has been used and has been referred to by the attorneys in this case in determining whether or not he was under these circumstances an employee is this: That the relationship is dependent principally upon whether or not the employer, in this case the defendant railroad company, retained and had the right to direct the manner in which the work was to be done by him, and also whether or not the service or activity which he was engaged in was a service for or an activity for and on behalf of the railroad company.

Now, you look at the facts that you have heard in this case concerning the circumstances and nature of the relationship between the plaintiff and the defendant and on the basis of that definition which I have just given you, you determine whether or not the facts show that the plaintiff was an employee of the railroad company. If he was, then he is entitled to the benefit of this Act, and if he wasn't, then of course you should decide the case in favor of the defendant.

One other matter you will have to determine, too, before you can determine whether or not the

plaintiff is entitled to the benefits of this Federal Statute is whether or not the [267] plaintiff and the defendant were at the time engaged in interstate commerce, and it isn't necessary for the evidence to show that any precise activity of the plaintiff at the particular time of the accident was a part of interstate commerce. It is only necessary that it appear from the evidence that any part of the duties of the employee shall be in furtherance of interstate commerce or foreign commerce, or which in any way directly or closely and substantially affect such commerce.

Therefore, look at the evidence in this case that you have and decide whether or not under that evidence the activity of the plaintiff at the time of this accident was of the nature of activities that I have just described to you as coming within the provisions of this law. If you find that they were, then the plaintiff has established that he was engaged in interstate commerce. If they were not, he has not so established that fact and of course if that is not established then you could not render a verdict in favor of the plaintiff.

There is another matter that you will have to determine in this case that affects the right of the plaintiff to recover and that is the defense that was urged by defense counsel, namely, that this plaintiff misrepresented his physical condition and falsely stated it and the defense is that by virtue of that fact he is debarred from claiming the benefits of this statute.

Now, you should examine the evidence in that



regard and [268] you should determine first whether or not the statements alleged to have been made by the plaintiff at the time he was examined were or were not false. If you determine that they were not false, then there is no need to pursue your inquiry any further, that defense will have failed. If, on the other hand, you determine that those statements made were false, then the next thing is to determine whether or not that caused any damage or change of position so far as the defendant was concerned, whether or not the defendant lost thereby the right to exercise the judgment as to whether or not the plaintiff should be employed or not. And you also have to further consider whether or not, even if that were so, whether or not there is any casual connection between the nature of the false statement, if it be a false statement, and the accident itself. If there be no casual relationship between the two, then of course it cannot be said that the defendant suffered any particular harm because of the false representation.

Those are the factors, members of the jury, that you should consider in determining whether or not that defense has or has not been sustained.

Now, members of the Jury, I think I have talked to you a little long, but this case does present some questions that are sometimes not present in other cases, and hence it is that I am speaking longer than I usually do to a Jury instructing. And this being your first Jury case you probably won't get as [269] tired of me as you might had you been on other cases and heard many judges' instructions.



You may start with the assumption that the leaving of the door in this engine firebox open was negligence. You then have to determine whether or not the plaintiff himself was guilty of any contributory negligence.

My own personal opinion in that regard is that there isn't very much substance to any claim that the plaintiff was himself in any way contributorily negligent. However, that is merely my own opinion and you are not bound by it and you can come to your own conclusion on that.

And the next thing you have to determine is whether or not there was interstate commerce present, and then you have to determine whether or not the plaintiff was an employee, and then you have to determine whether or not there is any basis to the defense of a fraudulent representation as I colloquially described it.

Now, if you decide in favor of the defendant on any one of those matters, then of course you can render a verdict for the defendant. But if you come to the conclusion that there was interstate commerce and that the plaintiff was an employee and that the defense of fraudulent representation is not sustained, then you are justified in coming to the conclusion that the plaintiff is entitled to recover.

That will bring you then to the question, after you have [270] covered those points, as to what damages the plaintiff is entitled to recover.

Now, generally speaking, in an action of this

kind, the Jury should consider the nature and the extent and severity of the injuries suffered and whether the same are temporary or permanent in character, and you can consider the mental and physical pain suffered by the plaintiff and which you are satisfied the evidence shows are reasonably certain to be suffered in the future.

And you also have the right to consider the value of any earnings that may be lost as the result of the disability—that is the loss of earning power, I should say.

Now, you are not entitled to award the plaintiff the full amount of any sum that you may determine is his earning power in any life expectancy which he may have, of some forty years, but you may only give him the present value of the loss of any future earnings only to the extent that those earnings, lost earnings, would reasonably result from the injury which he has suffered.

You can take into account his condition prior to the accident and his condition at the present time and take all those factors into account. You may determine the amount of damages that he should receive that precisely resulted from the injuries sustained.

I will say to you again that what I said to you in the [271] beginning, that the plaintiff is not entitled to recover anything for the injuries which he had already at the time of this accident for which the defendant, of course, is in no way responsible. So the award must be limited to the actual damages

which result from the particular injury which he incurred here.

Those damages must be reasonable. You are not here to impose penalties upon this defendant in any way, shape or form. The damages are the scheme which our law has devised in compensating for injury. We know of no other way of compensating for injury, but it must be on a strictly dollars and cents basis and it must be reasonable and it must bear a relation only to the actual injury incurred. You should use your common sense if you come to the point of estimating damages and confine yourselves strictly to the evidence in the case.

Now, you are not to infer because of the fact that I have given you instructions on the subject of damages that I am indicating that your verdict should be in favor of the plaintiff. I give you the instructions with regard to damages only so that you may have a standard to guide you in the event that you determine that plaintiff is entitled to damages.

You are not entitled, in determining the matter of damages, to consider what possible earnings the plaintiff might make in the future. You can't speculate on that. You can't reach up in the sky, as it were, and say, "I think [272] this plaintiff earned \$1000 when he is thirty years of age, and therefore calculate the damages on that basis." The basis of calculation, the loss of earning power, must be on the basis of the earning capacity of the plaintiff at the time of the accident and injury

in question, and a time reasonably proximate thereto in the past.

Now, members of the Jury, I think I have given you much that will help you, something that will help you in the consideration of this case. If you can conscientiously do so you are expected to agree upon a verdict. You should freely consult with one another when you go out in the jury room. I should like to say to you that if anyone should be convinced that your view of the case is wrong, after consultation, you should not be stubborn, you should not hesitate to abandon your own view under such circumstances. On the other hand, if after a full exchange of ideas you still believe you are right, you should adhere to the viewpoint which you have expressed. Your verdict should be based upon that sort of a consideration of the case.

Now, I want to caution you about one other matter, that is, if you should find in favor of the plaintiff, should award damages, you shouldn't arrive at the damages by any plan or scheme of chance. Sometimes in the past some jurors arrived at damages by each juror writing on a piece of paper how much he thinks the plaintiff should get and add them up and [273] divide them by twelve and get a result that way. We refer to that as the pooling plan. You cannot do that, because we wouldn't need a jury to do that, we could pick up any twelve people and have them do that and that would be an easy way out, and to be frank about it that is a lazy man's or woman's way of



arriving at a decision. I don't mean that if you do consider the question of damages you shouldn't suggest some amount that you think is right and then by discussion between yourselves arrive at a result. All I am meaning to imply is you shouldn't do it by any scheme of chance.

Now, whenever all of you agree to a verdict it is the verdict of the jury. In other words, your verdict must be unanimous. You should not return to the Courtroom with a verdict unless in the jury room all of you agree upon the verdict.

When you go out you will select one of your members as a foreman or forelady. Since you are evenly divided between men and women there is a fifty-fifty chance of selecting either a man or a woman as foreman of the jury. That we leave entirely to you, at any rate, to select one of your number as a foreman or forelady, and he or she will represent you as your spokesman in the further conduct of this case and will preside over the deliberations in the jury room, and he or she will sign the verdict of the jury when you have reached a verdict.

Now, we have two forms of verdict prepared for you to assist you so that you won't have to write any form of verdict [274] in the jury room. One verdict reads: "We, the jury, find in favor of the plaintiff and assess damages against the defendant in the sum of blank dollars." If you come to a verdict in favor of the plaintiff you will fill in the amount of the verdict and the foreman will sign that form and that will constitute your verdict.



Then the other form of verdict reads: "We, the jury, find in favor of the defendant." If you come to a verdict in favor of the defendant your foreman will sign that form and return it and that will be your verdict.

These forms have been prepared for your convenience and not intended to indicate to you in any manner what your verdict should be, in the manner I have read them to you or in the order that I have read them to you.

Do either counsel wish to note any exceptions? Wish the Jury excused for a moment?

Members of the Jury, it may be that I may have to make some change or addition to the instructions which I have given you and for that reason I will ask you to take a brief recess. The case is not yet submitted to you, the instructions are not yet complete, and you are still under the admonition not to discuss the case among yourselves or to form or express any opinion. I will send for you in a few minutes and notify you whether or not I have anything to add to the instructions.

Will you take the Jury out, Mr. Jones? [275]

(Jury retires from the Courtroom.)

Mr. T. Ryan: Shall I proceed?

The Court: Mr. Ryan, you wish to note any suggestions or exceptions?

Mr. T. Ryan: Yes, Your Honor, I wish Your Honor would instruct the Jury that it is not necessary for the plaintiff to receive compensation before he can be considered an employee. We sug-

gested that in our proposed instruction No. 13, said, you are instructed even though the plaintiff was a student fireman at the time of the accident and although he was not earning compensation, nevertheless he was an employee of the company and comes within the Federal Employers Liability Act. The jury might think that we are required to show he received compensation before he could be considered an employee, and I am doing that in the light of the *Watkins v. Prior*, whatever the case is.

I make an exception also on what Your Honor has already ruled that Your Honor failed to instruct the Jury that they could take into consideration the reduced purchasing power of the dollar and also I ask Your Honor to instruct the Jury that three per cent is a reasonable amount to take into consideration in figuring the present value of future earnings.

So in regard to that first request I had, that is, Your Honor instruct the Jury that he may be an employee even though he didn't receive compensation, we ask that especially in view [276] of the fact that Your Honor told the Jury they have a right to take into consideration the traditional relationship of employer and employee and the traditional one is usually where an employer pays compensation and the employees receive wages, because——

The Court: I don't think I told them they should take into account the traditional—I may have said preliminarily that some Courts have said that, but

that the test they were to apply is the one I gave them.

Mr. T. Ryan: I understand, Your Honor, when some courts have considered the traditional relationship Your Honor might have caused them to believe that if plaintiff didn't show a traditional relationship then he was not an employee, and the traditional relationship concerns the salary or a wage.

That is all of ours.

Mr. Dunne: Your Honor, please, we respectfully except to the refusal of defense proposed instructions Nos. 22 and 23. No. 22 is the Harmon case, told the Jury even if this young man was in a status of employee, if, on a particular occasion when he was injured he had departed from the course of his instructions in his own interest and benefit and deviated from the line of activity designated on the shift and went on the locomotive, then he had departed from the course and scope of any employment and could not recover.

And in connection with the same thing, Instruction No. 23, [277] hostler Petersen had no authority to set aside or modify any earlier directions or instructions which the plaintiff may have received by requesting him to go upon the locomotive and that a request from Petersen or an invitation from Petersen did not obviate or set aside earlier or contrary instructions.

The Court: Are those the only two?

Mr. Dunne: Only those.

The Court: I purposefully did not give those instructions and you may have it for the record so that you may have it for your protection as well, because I did not feel the facts of this particular case justified the giving of that instruction, not because I had any particular quarrel with that as a statement.

Mr. Dunne: Yes, Your Honor.

The Court: Now, with respect to the other matter, Mr. Ryan, inasmuch as I specified with particularity the test of the employee relationship I don't think it would be necessary for me to say the things that they were not to consider, because I think the instruction I gave was broader than that and I think if I were now to point out some particular thing it might be almost equivalent to telling them he was not an employee.

Mr. Dunne: There was no dispute in this case that he was not receiving compensation, and so obviously they must be able to decide it. [278]

The Court: I don't know how to cover that on that three per cent matter. It is true I didn't mention that. I don't think it is of any particular significance, because you have argued it to them and the Court and no one has taken an exception to that and I told them that they should figure the present value. I see no reason again for singling that out at this point. I think it would give undue emphasis.

Mr. Dunne: May I have an exception noted for the record?

The Court: Any exceptions will be noted.



Mr. T. Ryan: Exceptions will be noted, very well.

The Court: Bring the Jury back, Mr. Jones. Just line them up in here, don't have to put them in the box. Perhaps I should have used that loud-speaker.

Mr. T. Ryan: That is what a Juror asked.

The Court: The wires are mixed up, makes it difficult to use.

(Whereupon the Jurors were called back into the Courtroom.)

The Court: Members of the Jury, I will ask you not to take the box because it isn't necessary. The instructions of the Court are complete and you may now go outside and deliberate and reach your verdict in this case.

(Whereupon the Jury retired at 3:07 p.m.)

The Court: I will say, counsel, I shall file the proposed instructions that you have presented in the case so that your exceptions taken to them, by number, will be intelligible in [279] the record, so won't have any difficulty about that. Take a recess.

(Whereupon the Jury returns to the Courtroom at 6:07 p.m. and the following proceedings were had:)

The Court: Have you, members of the Jury, reached a verdict?

The Foreman: Yes, Your Honor.

The Court: Will you hand the verdict to the Deputy Marshal, please?



Will you read the verdict to the Jury, Mr. Clerk.

The Clerk: Ladies and gentlemen of the Jury, hearken to your verdict as it will stand recorded. "We, the Jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of \$50,000." So say you all?

(Whereupon there was an answer in the affirmative.)

The Court: Do you wish the Jury polled?

Mr. Dunne: Yes.

The Court: Will you poll the Jury?

(Whereupon each and every Juror was polled and the answer was in the affirmative.)

The Court: Twelve jurors having answered in the affirmative, the Clerk may record the verdict.

Members of the Jury, the Court wishes to thank you for the attention which you have given this case and for your attendance at the sessions of this Court as required. I don't [280] know when you will next be called upon to serve upon the Jury, but whenever that time comes you will get the bad news from the U. S. Marshal.

The Jurors may be excused.

(Jurors excused.)

The Court: The record should show that while the Jury was deliberating the Court received the following inquiry from the Jury, and I quote:

"Are we to take into consideration the fact

that false statements were made on the application for employment in determining settlement?"

To this inquiry, with the consent of counsel for both sides, the Court replied as follows:

"The defense interposed by the defendant based upon alleged false statements made in the application for employment goes to the question of the liability of the defendant. It has no relationship to the matter of damages in the event the Jury should decide for the plaintiff."

And you may file the written advice in the files of the case.

The Clerk: Yes, sir.

Mr. Dunne: May we have the usual stay of execution until ten days after determination of motion for a new trial?

Mr. T. Ryan: No objection.

The Court: Very well, that will be the order.

#### Certificate of Reporter

I, Official Reporter and Official Reporter pro tem, certify that the foregoing transcript of 281 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ P. D. NORTON. [281]

Friday, July 27th, 1951

The Clerk: Libbey vs. the Southern Pacific Company, motion for new trial.

Mr. Dunne: If your Honor please, may the record show that the defendant moves in accordance with its moving papers on file in this case, the motion being one for a new trial, and I want to call to your Honor's attention, for the purposes of the record largely and to make suggestions, to two matters which your Honor has passed upon and one matter which your Honor has not passed upon, and that is the amount of the verdict. I will not have to state the facts of this case. I am sure your Honor has them fully in mind. In re-reviewing the record and reconsidering it in the light of your Honor's submitting the matter of employment to the jury, there is a question there, the question on the basis of the employment alone without regard to any fraud under the doctrine of the Rock case, the question of fraud under the doctrine of the Rock case, and then the question which your Honor did not submit to the jury, as to whether or not, assuming this man had been employed within the meaning of the Federal Employers Liability Act, he departed from that employment.

I would like to take those in inverse order, if I may. Assuming that this man had acquired the status of an employee, I think the record is very, very simple on it. He stated that [2\*] he was told to follow the fire lighters and to keep his eyes open

---

\* Page numbering appearing at top of page of original Reporter's Transcript of Record.

and learn what he could about being a fireman. That was his testimony.

The second item of his testimony was that on two shifts he did follow the fire lighters, and he did state that he himself lit two fires. Then along toward the end of the shift, on which he was hurt, the second shift, around ten o'clock the fire lighters told him, well, the fires were all lit, there was nothing more for them to do. Just about that time Peterson, the hostler, came along. Peterson then said that he was going over and he was going to move the locomotive on which the accident happened. Peterson did not say that he invited the plaintiff to come along with him. The plaintiff said that he did. But Peterson said that in view of the fact that he had told the plaintiff, whom he had known before, that he was about to move the locomotive, he expected him to come along. Peterson's attitude was if he didn't say it in so many words there was a tacit invitation for him to come along and get on the locomotive, and, of course, Peterson knew that he was on the locomotive at the time Peterson undertook to move it.

The third item of testimony in that regard, and it is the only testimony on the subject, is Peterson's own testimony as to what functions he had with respect to a student fireman who at the moment from his superiors in the roundhouse had received no instructions except to go along with the fire lighters and [3] keep his eyes open and learn what he could about being a fireman. Peterson's testimony was this:



“Q. I see. Now, incidentally, had you had experience before with student firemen there at the roundhouse?

“A. I have had experience with student firemen. I have had them on the road—with them on several engine trips, road trips. As far as in the roundhouse, why, they are not under my jurisdiction.”

So Peterson's testimony in that regard is entirely consistent with the plaintiff's own testimony that his instructions were to follow the fire lighters.

It is apparent that the people who move locomotives around roundhouses are hostlers. Peterson was a hostler. Peterson was about to move a locomotive.

This testimony was offered by the plaintiff and not by the defendant. So there is a clear statement there by the hostler Peterson consistent with the plaintiff's original instructions that he as a hostler had nothing to do with student firemen, and it follows from that if the student fireman was going along with him, the student fireman at that moment on his second shift was stepping aside from the course prescribed, prescribed course of activity, whether it be called duty or otherwise, of a student fireman.

The Court: Your point then is not that he did not have the so-called status of student fireman but at the precise [4] moment, time, of this accident he was not engaged in activities that represented his position.



Mr. Dunne: As far as this point is concerned, that is exactly the point I am making, your Honor. I am assuming for the purposes of this point that he had the status of employee and indicating to your Honor that he stepped aside, he went off on a frolic of his own, which is the classic expression, at least in the older cases, but what he was doing he was doing something for himself, and stepping aside, in doing it, any relationship which he had assumed with the defendant.

In connection with that I want to again call your Honor's attention for your Honor's consideration, although you gave it consideration once, the defendant's rule in its book of rules. If this man had the status of an employee and whether he knew of those rules or not, those rules certainly defined his status. They certainly defined his relationship as to the defendant. It was perfectly clear. No dispute on this. It was perfectly clear that in going with Peterson he was going along to be on the locomotive at the time the locomotive moved. Rule 864 reads:

“Persons must not be permitted to ride on an engine or in a baggage, mail or express car without written order from the proper authority.”

Of course, none of that would apply at the moment. No question [5] of proper authority. But then there is an exception. The question is the application of this exception:

“Except employees in the discharge of their duties and those holding transportation endorsed to that effect.”

I am perfectly frank to say to your Honor that while we made a search for it I have found no case precisely in point. There are cases of unauthorized persons on locomotives being treated as trespassers. There are, of course, the usual cases of people stepping aside from the course of their employment. But to give your Honor a case in a situation such as this, I can't do it, and I am not going to attempt to do it, because your Honor is familiar with the general principles that apply, as I am. The only other case that could possibly have some bearing and that does, I think, have some bearing in this regard is that case of Harmons Administrator. It was cited in our instruction on this proposition, and I will give it to your Honor again. C. & O. Railroad Company against Harmons Administrator, 173 Ky. 1, 189 S.W. 1135.

I can state that case to your Honor very shortly. It presents the principle but is radically different on the facts concededly. In that case the man was a student fireman and had gone on a train. He had been in the locomotive of the train under the supervision of the engineer and the fireman and he had actually, as I recall the case, performed some of [6] the fireman's duties. It was a coal-burning engine, and I assumed that he shoveled coal. After the run had progressed to a certain point, they got to a stopping point, as I recall the facts of the case, but there was a very distinct break in what he was doing on the locomotive. I think he went home to get some clothes or some food or something else. Then he got back on the train, as the train was to

continue on, but at this time he got on the caboose. While he was in the caboose the conductor on more than one occasion told him that he had no business being in the caboose, that he ought to get up in the engine, and also on more than one occasion the engineer, through the conductor, sent word back to him to come up to the locomotive, that he was wanted, that he wanted him to act on the locomotive as a student fireman, and, I think, at one time the message was that the fireman himself was tired. The deceased persisted, however, in staying in the caboose, and was in the caboose at the time of a rear-end collision and was killed. The facts are obviously, if your Honor please, radically different, but the Court does make a point, although he was on the train at the time and without saying that he was there as a trespasser it does say at that time he had stepped aside and the status of employee did not apply to him.

Further search after this case was tried, and that matter has failed to disclose, for us at any rate, cases which on their facts are close enough to be helpful. The matter then is [7] a matter of the application of what I think is perfectly well established principle and thus applies to the facts of this case and to the very simple facts in the light of this rule, and if not, then if it were a question of fact for the jury at all, whether assuming the status of an employee he had stepped aside from that and could no longer be said to be performing service, whether or not it was there on your Honor's part to exclude Rule 864.

Your Honor's two rulings in that regard, first, that you did not think 864 applied and declined to receive it in evidence, and, on the second thing, your Honor did not think there was any question of fact there and refused our two instructions, to submit that matter to the jury as a question of fact, and it was the exception to the refusal of those two instructions, which was the only exception which I took to your Honor's charge.

Now going back to the proceeding step, the matter of employment. On the matter of fraud, we had the doctor on the stand who examined this young man. He did not remember him. He had, however, made out this application, which is here in evidence, and the application on its face indicated in connection with the questions that were put, that this young man had made misrepresentations, and that when the doctor saw the scars of his prior injury on the left leg they were explained away on the ground that that was an injury that he had as a [8] child and, while he didn't testify to that, if true, would leave the inference that the injury was not disabling and the man had been in the Marines, in the service since. I then asked the Doctor this question, putting to him the hypothetical situation of this young man and an objection was made upon the ground that I had not included all the elements, and I then included all the suggested elements and in effect put this question to the Doctor:

"Doctor, had you known these facts at the time you passed this man, would you have passed him as a fireman?"



To which your Honor sustained an objection upon the ground, as I recall it, that perhaps it invaded the province of the jury and called for the opinion and conclusion. Perhaps it was somewhat hypothetical because it was now asking the Doctor what he would have done in the past knowing now this event he didn't know about then. As to that type of question, if your Honor please, very frankly, without bringing to your Honor all of the authorities on it, there is some division among the courts as to whether or not such a question should be answered. I suggest to your Honor that it is a question which ought to be put and on which we should be permitted to have the answer, and that the method of testing it is by assuming that the answer would have been unfavorable to me. Assuming that had I put the question to the doctor, his answer [9] would have been, "Had I known all the facts, I would have accepted him anyway," it is perfectly obvious that such an answer would have completely destroyed any claim upon our part there was any fraud upon which he relied and acted in connection with the employment. That being so I think the converse is equally true, that we are entitled to have the other answer. But that matter did not stop there and on this, so far as I know, there is no substantial dispute among the cases, although I cannot find a case on this precise point, or, at least, haven't found it yet.

The second question in effect was an entirely different question. I asked the Doctor again, I said:

"Doctor, assuming the same facts, would this



man have met the standards set by Southern Pacific Company for the employment of fire-man?"

And again an objection was made and was sustained by your Honor. I think that is an entirely different question because that is not asking a doctor to speculate and to hypothetically transpose himself backward and say what he personally would have done as of a given time in the past in circumstances that he didn't know, but it is now asking him for his present opinion as a man qualified to give that opinion whether or not a particular man lived up to certain standards. It is obviously, if your Honor please, the only method by which, when the matter is submitted to personal judgment of a [10] physician and of one who is qualified to state an opinion and who is employed actually to perform those opinions, I suggest to your Honor that that question was an entirely proper question and it was very material going to the question of reliance. It well may be that the jury couldn't speculate one way or the other, but it is a question that goes directly to the matter of our reliance.

The third thing is in connection with the question of employee status, whether or not there was such a status in view of the relationship of the party. That is a matter which your Honor submitted to the jury. I have no new suggestion to make on that matter except to recall it to your Honor's attention. I have no new cases that I think will add anything in particular to the case of Watkins

against Thompson which your Honor read during the course of the trial. I could go through cases which are cited there. I could go through the other cases under the Federal Employers Liability Act, and then there are some older cases and cases in different situations. But so far as those cases are concerned, I think the Watkins case pretty well sums them up.

What the Watkins case does show is this—I think this is fair to say—the Watkins case permits us to look at all of the circumstances involving the relationship of the parties and all of the circumstances that throw light on it, and it says that the two principles—I don't think the Court in the [11] Watkins case wanted to be understood to say that these were the only two tests that were to be applied woodenly, but first whether or not the alleged employer had control over the conduct of the alleged employee. I would not suggest to your Honor in this case that he did not have such control so long as he was on our premises and was going about the activity, being student fireman, which is perfectly obvious, because we couldn't have a man like that wandering around the roundhouse, moving trains and locomotives and other equipment without having supervision and direction over him. So in that sense certainly we had control. In another sense perhaps we did not.

The other test, of course, is the main item, was whether or not this man was performing service. On that I think I have perhaps very largely covered the material. Your Honor made a suggestion

that perhaps in taking some of these positions I was being somewhat technical, and I have to grant that they are technical, somewhat technical matters because they are matters of the application of the statute, and yet whether we——

The Court: I don't think I was referring to the question of employee status there. I thought that was more particularly with reference to so-called defense of——

Mr. Dunne: Of stepping aside?

The Court: No, no. I thought—maybe I am wrong, but [12] my recollection is that I was referring only to the so-called fraud defense.

Mr. Dunne: Well, I don't mean to do anything more than to point out and use that as an introduction, which perhaps I should not use——

The Court: I don't think there is anything technical about the question of whether or not there was an employee relationship. That is a fundamental question.

Mr. Dunne: That's right, and because it has such marked results in the effects if the Act does apply.

Now, as bearing on that then, and this bears on a matter which I think bears both on the question of service and on the question of control. I would like to give your Honor again the language of our Exhibit A for identification, which was the writing that this young man signed at the time—I will find it someplace. Perhaps it was not read into the transcript. This writing which he signed and signed at the time he was going through these

various steps which brought him up to whatever status he had when he went into the roundhouse, that application for permission to observe operations of locomotives, cars and trains—to observe, not to perform service. Then:

“Whereas, I, the undersigned, Roger N. Libbey, residing at Sutros Heights in the State of California, and being 27 years of age, have applied to Southern Pacific Company for permission to enter and ride upon [13] the locomotives, trains, and cars of said company for the purpose of observing the operation of the railroad of said company, with the understanding that I shall be under no obligation to perform any work or service upon said railroad employed by said company, and that neither said company nor I shall be under any obligation with respect to my entering the employ of said company at any time.”

And then it goes on, he assumes the risk of injury.

I offered that as a whole, and then, because might be some possible implication arising from the second two paragraphs in which he said he undertook to assume the risk of injury, I offered that first paragraph alone and as a factual matter going to the question of what the question was and indicating he was there only because he had permission to observe and, secondly, on this matter of control, that he would be under no obligation to perform any work or service upon the railroad.

On the question of control, the question of con-



trol is a very curious one in some respects. Obviously——

The Court: Would you mind my interrupting there? Realistically speaking there can't be any question that this young man was known as a fireman.

Mr. Dunne: That's right.

The Court: How can you convert what he actually did by some writing that he signed into the contrary? I mean, if the [14] function or if in order to learn as a student fireman he must observe, then those observations that he makes constitute his service in the sense that he has to be there and physically and put himself at the disposal of the other employees so that he may be in a position to observe, and by observing acquires some learning as to the way these things can be done. And can you simply say by putting some words into the contract that that does not constitute service? It is merely an observation. And that while he is a student fireman he agrees in writing that he is not a student fireman? Doesn't that argument fall in the face of the many cases along that general line, that you cannot contract away by putting words in a contract the actual relationship?

Mr. Dunne: I would agree with your Honor thoroughly on that. I would agree with your Honor that the test is not by some form that we get up and have these people sign, but the test—the test of the real fact—and window dressing in the form of an agreement or whatever it is cannot be used to disguise that real fact, which your Honor will



look through—any such window dressing—to see what the real fact is. That I will agree with. But, and I think this is probably where your Honor and I part company, I offer that to show what the real fact is. Now, a moment ago I conceded, your Honor, that realistically this young man could be looked upon as a student fireman. Quite true. But that still leaves open [15] the question and does not solve the question whether or not a student fireman is an employee within the meaning of the Federal Employers Liability Act. And for that, even under the Watkins case, if we just take those two tests alone, two things must be true. We must have control and he must perform service for us. It is quite true that under our system where we don't have any indenture servants, there is no peonage, there is no slavery, that no matter what contract of employment a man makes he can leave that contract of employment at any time. But if there is a real agreement of employment he subjects himself to liabilities and he assumes responsibility when he is an employee, both to his employer and to some third person. Under this writing that I have just read to your Honor where he expressly said that he assumes no obligation to perform any service, that young man could have walked out of the roundhouse at any second of time he wanted. At the time the fire lighters told him there were no more fires to light, whether the shift was up or not, he could walk right out of that roundhouse and go right about his business being under no obligation to anybody at all.

The Court: Well, can't a regular employee do that?

Mr. Dunne: That is what I said to your Honor. A regular employee can because we have no slavery in any form in this country and an employee can leave his work at any time.

The Court: Is that any test then? [16]

Mr. Dunne: But if he is an employee and does that, he assumes responsibilities. He can be sued for damages. He owes obligations to his employer under the contract of employment.

The Court: There might be different consequences——

Mr. Dunne: That's right.

The Court: ——that would flow from a refusal to carry on as between a learner and an actual employee.

Mr. Dunne: That's right. I don't suggest that as a conclusive test. I don't have to, your Honor, because your Honor excluded this from evidence. I say it is a factual element that should have been before the jury.

The second thing, if your Honor please, is this, there may be some intimations, there may be some pretty broad language in one or two of the cases, but no case that I know—I would like to be corrected on this if I am wrong, but there is no case that I know of that has gone so far as to say that these observers are performing services for the employer when they observe and do nothing more. I think it is fair to say that in all of the cases—well——

The Court: Of course, in the Watkins case the man was doing something.

Mr. Dunne: And relieving another man of duty. Also in some of the cases it has been argued that if he were observing or doing something and the regular employee was there at the [17] same time, who would have done the work had the student not been there to do it, it has been argued therefore he is not performing any real service because he is conferring no benefit upon the employer, that if he weren't there doing that the regular employee would. The courts go along with—they said if you are doing it you are still performing service.

The Court: There is evidence here that he did do some service to the limited extent of having lighted a couple of fires.

Mr. Dunne: That's right.

The Court: Now it is true that he was not doing that service, was not engaged in that precise activity at the time of the accident, but need he be at any time if he were doing that?

Mr. Dunne: Doesn't it bear, though, on this, your Honor, doesn't it bear on what his status was at the time he was in the cab of this locomotive and isn't his understanding as expressed in this writing and his employer's understanding likewise as expressed in that writing; isn't that an element of fact; isn't that one of the facts that the jury should have had before it in passing on these very questions that your Honor and I are now discussing? Your Honor's ruling in the case was that it was not for you to pass upon them but it was for

the jury to pass upon them, and the result was that the jury passed upon them with one of the elements that showed what the [18] relationship was, because there are two sides to it—there must be the employee's side as well as the employer's side—that matter was submitted to them dropped out of it. The only expression of the employer's understanding of the relationship and the expression of it, at least to some extent that the employer was likely to rely on——

The Court: It may be that the Court should have—I don't know—it may be that the Court should have given some specific—more specific instruction to the jury as to whether or not at the time of the accident the plaintiff had substantially departed from his status and from the performance of his duties as a student fireman.

That appears to me is the really more important question in this case under the Watkins rule.

Mr. Dunne: Well, I am inclined to agree with you, but I think——

The Court: I think, as I said, realistically speaking on the basis of the evidence here it is pretty hard to get away from the fact that he was a student fireman, that he was there to learn how to be a fireman, and maybe his learning might have only consisted of observing, but the big question is whether or not, assuming the rule in the Watkins case to be correct, is there sufficient evidence in this case or not to point out that he was within that rule at the time of the accident.

Mr. Dunne: But those questions—— [19]



The Court: Of course, in the Watkins case the man was doing something.

Mr. Dunne: And relieving another man of duty. Also in some of the cases it has been argued that if he were observing or doing something and the regular employee was there at the [17] same time, who would have done the work had the student not been there to do it, it has been argued therefore he is not performing any real service because he is conferring no benefit upon the employer, that if he weren't there doing that the regular employee would. The courts go along with—they said if you are doing it you are still performing service.

The Court: There is evidence here that he did do some service to the limited extent of having lighted a couple of fires.

Mr. Dunne: That's right.

The Court: Now it is true that he was not doing that service, was not engaged in that precise activity at the time of the accident, but need he be at any time if he were doing that?

Mr. Dunne: Doesn't it bear, though, on this, your Honor, doesn't it bear on what his status was at the time he was in the cab of this locomotive **and isn't his understanding** as expressed in this writing and his employer's understanding likewise as expressed in that writing; isn't that an element of fact; isn't that one of the facts that the jury should have had before it in passing on these very questions that your Honor and I are now discussing? Your Honor's ruling in the case was that it was not for you to pass upon them but it was for



the jury to pass upon them, and the result was that the jury passed upon them with one of the elements that showed what the [18] relationship was, because there are two sides to it—there must be the employee's side as well as the employer's side—that matter was submitted to them dropped out of it. The only expression of the employer's understanding of the relationship and the expression of it, at least to some extent that the employer was likely to rely on——

The Court: It may be that the Court should have—I don't know—it may be that the Court should have given some specific—more specific instruction to the jury as to whether or not at the time of the accident the plaintiff had substantially departed from his status and from the performance of his duties as a student fireman.

That appears to me is the really more important question in this case under the Watkins rule.

Mr. Dunne: Well, I am inclined to agree with you, but I think——

The Court: I think, as I said, realistically speaking on the basis of the evidence here it is pretty hard to get away from the fact that he was a student fireman, that he was there to learn how to be a fireman, and maybe his learning might have only consisted of observing, but the big question is whether or not, assuming the rule in the Watkins case to be correct, is there sufficient evidence in this case or not to point out that he was within that rule at the time of the accident.

Mr. Dunne: But those questions—— [19]

The Court: Because I submitted that to the Jury. It might be I should have given them more precise instructions, but that is a rather interesting question, I think, in this case.

Mr. Dunne: I'm sorry——

The Court: I don't think so much about the other questions as I do about that one.

Mr. Dunne: Except when they are submitted to the Jury—Your Honor's rulings in excluding some of this evidence, even some, would have submitted only part of the story to the Jury.

The Court: There wasn't anything excluded from the Jury in connection with the facts as to his activities at the time.

Mr. Dunne: No, not the physical facts.

The Court: What was excluded was this defendant's Exhibit A.

Mr. Dunne: Defendant's Exhibit A for identification and Rule 864. Those are the two things.

The Court: What is that Rule 864?

Mr. Dunne: That said unauthorized people cannot be on a locomotive except in discharge of their duties.

The Court: Oh, yes. Well, those two may be bound up in that question at least.

Mr. Dunne: In other words, what I am suggesting to Your [20] Honor is that this thing is a fagot. It is a fagot bound together. The whole thing must be looked at together to see what is its strength or weakness. You can't do it by taking a part and testing each one of the members one by one. What Your Honor did was to exclude some

of the members that would have reflected upon other things and would have given the Jury the whole picture.

The other thing I want to suggest to Your Honor, very briefly, is the question of damages. The question is most difficult and I know that Your Honor is extremely hesitant in disturbing findings of the Jury on the question of damages, even when Your Honor, had you been left to yourself and had been deciding the case, Your Honor might have rendered a judgment for a sum which was substantially less. But it seems to me that on the facts of this case \$50,000 is an amount—because Your Honor can deal with this both as a question of law and as a question of fact—is an amount which is completely out of line.

Now may I suggest just briefly these things in that regard. This man certainly is not an economic derelict. He is a comparatively young man. He is twenty-seven. He is young enough to learn a trade. He never had a trade. He didn't lose anything by this accident. He hadn't had some years of training in a particular trade which required him to use his legs and now has to give that up and go on to something else, but he is [21] young enough so that he can adjust himself and he can learn a trade. He is very far from an economic derelict.

Aside from the discomfort that will result to him, then if he is entitled to receive anything, he is entitled not to something that is going to take care of him for the rest of his life, but he is entitled to something that is going to make up to him in some

measure a handicap. As a matter of fact, if he acquired any one of a whole series of facilities in vocational training where he could do bench work and other work with his hands, the only thing that he need make up to him would be something to make up to him for some discomfiture which he is going to experience for the rest of his life. He could very well receive vocational training which would permit him to earn—as a dental laboratory technician—now I use that example, if Your Honor please, because that is what happened in the Thiel case which is a fairly well known case in this Court, and was tried here twice. That was the case of a man who had received a very severe injury to an arm. The first time we tried it the fracture had not united yet and he had lost both legs and that man had gone through a course of vocational rehabilitation and at the time we tried the Thiel case the second time he was making more money than he ever made in his life. So that this man isn't going to go through life not working. He is going to acquire a trade. He has the facility, the ability and the state will give him the [22] training to acquire the trade. The question is, in the light of those circumstances, what should be made up to him. He had been earning at one time, his testimony was, when he was in the Merchant Marine, \$300 a month. That was at a time when, with his original injury on the left leg, one which at that time certainly was duplicating, at least in the early stages, the injury which he received in jumping off this locomotive, the Government paid him a pension at \$75 a month. Of course that is a different kind



of a program, granted, but it does indicate something to help along what is a fair measure. After that he was earning—his highest earnings that he gave us was a little over \$190 a month. The record unfortunately cannot be made clear and isn't entirely clear as to what the effect of his injury on his left leg was having on him. It does appear, however, that he had never held any one job for any particular length of time.

Now, the factors were given and simply assuming that three per cent factor, the factor on a three per cent basis, which is 23.11, if he was given half of what he was earning just before this accident as something to help him along because of a handicap, that would come to \$1200 a year and that would come to \$27,732 total. Perhaps that needs some adjustment. Perhaps it should be adjusted upward or downward. Perhaps the handicap isn't that severe. Also I am willing to assume that for a year or perhaps two years there will be a [23] period of further rehabilitation and a period of training that couldn't be counted on. But certainly he will at the end of two years—at the end of two years that young man is going to be doing something, some work. He is going to be doing remunerative work. He is going to be earning as much as he was earning at the time he started in being a student fireman. He is going to be earning \$200 a month. To go to matters which are general knowledge for all of us, the easy work of being an elevator operator pays better than \$225 a month. I don't know really of any substantial full-time job, certainly around



the city, that pays less than that, and it is in view of those circumstances that I am suggesting to Your Honor that \$50,000 is entirely too high to be fair compensation.

What obviously happened with this Jury, whether they did it consciously or unconsciously, they looked at this man as a single man who was before them, and in his physical condition, and said to themselves, what are we going to do to take care of this man and, in spite of Your Honor's very clear instructions on the subject, overlooked the fact that his present physical condition and his present handicaps are not entirely due to the injury in the roundhouse but in very large measure are due to the injuries received during the war. The curious thing about that is that the injuries are almost identical, both in the original injury and in the way they repaired themselves, with the exception that the injury to the left leg did [24] not cause a shortening. The injury to the right leg caused a one inch shortening.

The Court: The injury that he got in the accident, of course, was proved to be far more disabling than the other injury he got in the army.

Mr. Dunne: That was because it has given him that limp. It is principally because of that one inch shortening.

The Court: He has got a bad leg there. It is a bad injury. There is no doubt about that. And if—you say it is very difficult to distinguish on the facts some of these matters—if the verdict is more—I said this several times in several of these cases—

it is more than I would have given, but then again I may not be right about that. While it is not the equivalent of having no leg at all, what he has, though, is a pretty bad injury. It is a pretty permanent injury, and I don't know if there is enough in this case to warrant exercising discretion in favor of remittitur. If the damages were to be revaluated, they ought to be revaluated rather than cut down, because it is not an easy—it is not an easy damage case in that respect.

Mr. Dunne: It has been a very difficult one for me, if Your Honor please.

The Court: It is difficult to disassociate the elements in special circumstances of this case, the elements that are proper for consideration, without taking into account some [25] inter-related circumstances. I think the railroad company and the plaintiffs in any of these cases do a better job of it when they do it themselves rather than when they go to Court. I mean, looking at it abstractly and objectively as to what is a just result, I think some of these cases, like all damage cases, are very difficult to evaluate. This is a particularly difficult one.

Mr. Dunne: It occurred to me I might argue this to Your Honor. While this Jury has given him fifty thousand dollars for one leg, in the light of the fact that he has two bad legs, would they have awarded him a \$100,000 for two bad legs? If they had, certainly that would have been way out of line in view of what lies ahead in the future for this young man. And yet I felt that is not an entirely fair argument to make because I think the injury

to the right leg is as severe as the injury to the left. Then we had the testimony of Dr. Guterman, who put it this way, that he was not particularly optimistic. He testified from a medical point of view that he didn't see very much in the way of improvement lying ahead for this young man. Yet in view of the history of the other leg, while perhaps medically there may be no improvement—in the medical condition—I can't believe that this young man will be better adjusted to his unfortunate condition in two years than he is now.

The Court: Well, of course—— [26]

Mr. Dunne: And it is those——

The Court: That's somewhat speculative, though. That phase of it, it is hard for you or me to come to a satisfactory conclusion.

Mr. Dunne: It's hard for anybody.

The Court: We have to go on the evidence which we have and it is difficult to appraise that evidence.

Mr. Dunne: Well, on the basis of past experience I am urging this upon Your Honor, because I wanted Your Honor's judgment, and in making the motion on that ground I felt, as Your Honor has expressed from the bench, that this result is higher than Your Honor would have awarded had the awarding of damages been put in Your Honor's hands. The question that remains for Your Honor is the question of exercise of discretion, whether remittitur should be ordered as condition for denial of new trial or whether there should be a new trial.

Unless there is something that Your Honor wishes me to look up and further present, I am prepared

to submit the matter because I have not been able to find anything that is really precise on it and I think Your Honor is thoroughly familiar with the general principles which apply.

The Court: You are reading from some transcript there, Mr. Dunne. Is that a complete transcript of the case?

Mr. Dunne: No, it is not. It is a transcript of only the first two days and does not have the testimony of the doctors. [27]

The Court: You mean on the damage question?

Mr. Dunne: On the fraud question.

The Court: On the fraud question.

Mr. Dunne: Yes. Otherwise it is complete.

The Court: Have you a copy of that?

Mr. Ryan: No, Your Honor.

Mr. Dunne: Do you want me to leave it with Your Honor?

The Court: The thing I would like to review is the testimony as to the happening of the accident, the circumstances involved. That is in there?

Mr. Dunne: That is in there.

The Court: Just what he was doing, the testimony with respect to the activities of the plaintiff as a student fireman, that is what I am particularly interested in. Is that in there?

Mr. Dunne: Yes.

The Court: Have you any marks in there that I shouldn't see?

Mr. Dunne: No, none.

The Court: Will you be good enough to leave that? I will return it to you.



Mr. Dunne: So that Your Honor will understand, here's the course that it took. The plaintiff completed his testimony the afternoon of the second day. We then made a motion for non-suit. Your Honor denied that. Then as long as the Jury [28] was out and Your Honor had indicated some questions on the evidence, I then made my offers of proof at that time in the absence of the Jury, and Your Honor ruled on them. So that when we came back the morning of the third day the only testimony taken was the testimony of the doctor who had examined this man and testified on the fraud issue and the matter was then argued and submitted.

The Court: All right, Mr. Ryan.

Mr. Ryan: May it please Your Honor, addressing myself to the question that Your Honor thought the uppermost question of deviation from employment, and the question of Your Honor not giving defense Instruction 22 or 23 or the substance of them. Your Honor stated at the time that Mr. Dunne made his exceptions to the failure to give those two Instructions that you read the case of Chesapeake & Ohio Railroad Company vs. Harmons Administrator, from Kentucky, and you had no quarrel with the law as expressed in that case, but, you stated at that time, you did not believe that the evidence in this case showed any deviation and that there was no question of any substantiality to go to the Jury on that point. I believe from the entire evidence in this case that Your Honor was entirely correct at that time. There was practically no con-



flict all the way through. The Southern Pacific Company called only one witness, and that was the doctor on the fraud issue. They did not contest the seriousness of the injury. They didn't [29] produce any medical testimony, and although—I won't say they had the man—the man was available, the foreman, if there were any wrong statements or incorrect statements made by the plaintiff as to what was the scope of the authority given to him to go into that roundhouse and what he was to do there, the foreman was available, Mr. Tim Ferrell.

All right. Now, so all we have on that is the testimony of the plaintiff, not Peterson, as I will call to Your Honor's attention in a moment. The plaintiff in this case, Mr. Libbey, said that he was given authority to go into that roundhouse when he went to get his job and he was supposed to present this authority to the roundhouse foreman. The authority, which is in evidence—I have a copy of it here—stated this:

“Authority to pass and instruct student.

“Please see that Libbey, student fireman, is thoroughly instructed”——

Not partially instructed, but

“thoroughly instructed in the duties of the position named”——

in the duties of firemen——

“and impress upon him the importance of thoroughly acquainting himself not only with the duties of that position but of any other

with which he may be entrusted or to which he may aspire."

The evidence showed that at Roseville the duties of hostler were conducted by firemen. In other words, all hostlers were [30] firemen of the company. Part of the duties of hostlers were taking engines out of the roundhouse and spotting them in various tracks.

In addition to that he presented that to the roundhouse foreman. Now, here are the instructions the roundhouse foreman gave him. He said, "I want you to go around with these two Mexican boys who are firelighters and learn how to light fires. In addition to that I want you to keep your eyes and ears open and learn everything you can about being a fireman."

That was pretty broad. No contradiction, no narrowing of it, no instructions whatsoever that he was not to go on a moving locomotive, none whatever, but this was very broad charter of authority that was given to him. All right. With this broad charter given to him he worked for two days. The first day he did nothing but observe firelighting. The second day, from what he had learned by observation, he lit two fires on two locomotives. He prepared two locomotives. And, on the question of whether he performed any service for the company, he lit fires on one locomotive, which was an empty Mallet, that was going from Roseville, California, to Sparks, Nevada, and the other one was a local at the Bowman turn, I think they call it, and he lit the fire on that one. All right. Now, at the end of

the second day the firelighters said, "We have lit all the fires. There are no more locomotives to fire up. We are going to go." [31]

So he was standing around with nothing else to do when he met his friend or acquaintance Petersen, who was a hostler, and he asked him, "What are you doing here?" He said, "Oh, I'm a student fireman." Petersen said, "Oh, you are. I am going to take this locomotive out and spot it on one of the tracks. Do you want to come along?" And he said, "Yes," and he got in and he got in for the purpose of learning under this broad charter that he had received, both in writing and from the oral instructions of the roundhouse foreman, to learn everything he could about being a fireman. One of the things he had to learn about being a fireman was how to take an engine out of the roundhouse as a hostler and spot it and also to observe how an engine should be operated, and he was doing that when he got hurt.

The only other testimony on this point is the testimony of Petersen himself. Petersen testified substantially as I have just said, that he met Libbey, whom he knew from around the town of Roseville, and he found out he was a student fireman, and he said, "I am going to take this engine out. Come along if you want." All right. Then on cross-examination Mr. Dunne asked him if he ever had anything to do or any experience with student firemen. He said, "Yes, I have seen student firemen around there. In fact, I have had them out on the run with me around the yards when they were

learning their work. Then Mr. Dunne put this leading question to him, which he had a [32] right to because he was cross-examining him, "Have you any jurisdiction over student firemen in the round-house?" He said, "No, I have no jurisdiction over them whatever." That meant, the word jurisdiction—but the point is this, to show that Your Honor was correct in saying there was no evidence of deviation which Your Honor could give to this Jury so that Rules 22 and 23 could be applicable, there was no testimony that he was forbidden to go on an engine, and the testimony of Petersen that he had no jurisdiction over student firemen is not any testimony or showing that there was any deviation from the written instructions or the oral instructions that plaintiff had received.

One other point. Your Honor expressed some doubt on this proposition, under the Watkins case whether or not—and Mr. Dunne said he had no cases on this point—whether or not you have to show that the student fireman is actually physically performing some service for the railroad at the instance of his injury. I say you don't have to show that because the Watkins case is one itself where he wasn't doing anything at the moment of injury. In the Watkins case Your Honor will remember——

The Court: That's right. He already checked the car and he was walking away when he was injured.

Mr. Ryan: That is what I have in mind. He was hired as a clerk and he had finished going down



one side of the cars and [33] the other was working on the other and they finished that job and they for their own amusement, for their own benefit, went to some coffee shack to get some coffee and they finished their coffee and they were just walking across the tracks when the clerk went between the cars and the student saw the clerk do that so he went between the cars and they were started up and he was injured. So he wasn't doing anything at that time.

In addition to that there are other cases on that where the people weren't doing anything, the student, I mean, wasn't doing any work for the company at the time of the accident.

The Rule is this, was he under the control of the railroad, and, of course, there I don't think there is any question about that, that he was. And then performing services, did his job as a student fireman require him to perform services? Well, that was submitted to the Jury that way in this case and there was the undisputed evidence that he did do actual service for the company in lighting these fires.

In addition to the case that Mr. Dunne cited, Chesapeake & Ohio against Harmons Administrator, a Kentucky case, we have cases like this, and here is a case of Huntsicker vs. Illinois Central, 129 Fed. 548, from the Sixth Circuit in 1904. That was a case of a student flagman who at the time of the accident was making a trip, and he did some flagging during the day but at the time of the accident he was killed in the caboose [34] while



sleeping, and he wasn't doing any service at the time of the accident. Then we have the case of *Brown vs. The Chicago Northwestern*, 286 Southwestern 45. A student fireman, just like in this case, at the end of the run was walking to the yard office and washroom and was killed by a train on the other track. It was held that he came under the Federal Employers Liability Act, that he was an employee because during the day he as a student fireman was merely observing; he didn't operate the engine; he sat in there and was just observing. So I think that there is plenty of evidence that he was an employee.

Just a word now on the question of fraud.

The Court: I don't think you need to argue that.

Mr. Ryan: On damages I think it was a question for the Jury. Your Honor will recall that I used this figure on the board. He earned \$300 a month while he was in the Army Transport Service and there was some record of his past earnings, some record of his earning capacity. So giving the figure, whatever the three per cent was, it came out to \$82,800. The Jury brought in a verdict of \$50,000. I make this argument on that point: Supposing the Jury took the lowest figure that you had, which would be the \$190 a month that he earned while working as an airplane mechanic at McClellan Field, and if you took that alone that would come to more than this \$50,000; or if you even follow Mr. Dunne's suggestion and say that the Jury said, "Why, certainly, which is obvious, there was [35]

some reduction in his earning capacity; bear in mind before he had this accident his earnings weren't too much. So Mr. Dunne would have him making more money as an elevator operator than he earned before the accident when he was in pretty good health, when he could walk seven miles a day, and could work with a pick and shovel. But suppose they say his earnings were cut down, in half. If you say that his potential earnings would be \$300 a month and today, on account of his injuries, he could earn half of that, \$150 a month, that \$1800 a year, and you take the three per cent figure for his life expectancy, that would come out to \$41,400 under the method that Mr. Dunne suggests, which would leave only \$8600 for pain, suffering and disability, bearing in mind that the undisputed evidence of Dr. Gueterman is that this boy will have pain the rest of his life, that the only way you can eliminate pain would be to fuse his knee and make it solid. Because he has two bad legs, he wouldn't do it, he wouldn't recommend that. So he is condemned to pain for a long life expectancy, and that would only be \$8600—a very conservative amount to reach, this figure of \$50,000. And the rule has been stated many times in this Court, as Your Honor did, as your Honor cited in the Guntrey case—you cited *Jones vs. The Atlantic Refining Corporation*, when the Court said:

“When there is any margin for reasonable difference of opinion in the matter of damages the view of the Court should be held to the [36] verdict of the Jury rather than the contrary,”

sleeping, and he wasn't doing any service at the time of the accident. Then we have the case of *Brown vs. The Chicago Northwestern*, 286 Southwestern 45. A student fireman, just like in this case, at the end of the run was walking to the yard office and washroom and was killed by a train on the other track. It was held that he came under the Federal Employers Liability Act, that he was an employee because during the day he as a student fireman was merely observing; he didn't operate the engine; he sat in there and was just observing. So I think that there is plenty of evidence that he was an employee.

Just a word now on the question of fraud.

The Court: I don't think you need to argue that.

Mr. Ryan: On damages I think it was a question for the Jury. Your Honor will recall that I used this figure on the board. He earned \$300 a month while he was in the Army Transport Service and there was some record of his past earnings, some record of his earning capacity. So giving the figure, whatever the three per cent was, it came out to \$82,800. The Jury brought in a verdict of \$50,000. I make this argument on that point: Supposing the Jury took the lowest figure that you had, which would be the \$190 a month that he earned while working as an airplane mechanic at McClellan Field, and if you took that alone that would come to more than this \$50,000; or if you even follow Mr. Dunne's suggestion and say that the Jury said, "Why, certainly, which is obvious, there was [35]



some reduction in his earning capacity; bear in mind before he had this accident his earnings weren't too much. So Mr. Dunne would have him making more money as an elevator operator than he earned before the accident when he was in pretty good health, when he could walk seven miles a day, and could work with a pick and shovel. But suppose they say his earnings were cut down, in half. If you say that his potential earnings would be \$300 a month and today, on account of his injuries, he could earn half of that, \$150 a month, that \$1800 a year, and you take the three per cent figure for his life expectancy, that would come out to \$41,400 under the method that Mr. Dunne suggests, which would leave only \$8600 for pain, suffering and disability, bearing in mind that the undisputed evidence of Dr. Gueterman is that this boy will have pain the rest of his life, that the only way you can eliminate pain would be to fuse his knee and make it solid. Because he has two bad legs, he wouldn't do it, he wouldn't recommend that. So he is consigned to pain for a long life expectancy, and that would only be \$8600—a very conservative amount to reach, this figure of \$50,000. And the rule has been stated many times in this Court, as Your Honor did, as your Honor cited in the Guntry case—you cited *Jones vs. The Atlantic Refining Corporation*, when the Court said:

“When there is any margin for reasonable difference of opinion in the matter of damages the view of the Court should be held to the [36] verdict of the Jury rather than the contrary,”

especially in a case of this sort where it is conceded that it is a serious injury, it is a permanent injury, and there is no question about it, it is uncontradicted. So I am willing to submit the matter as it is.

The Court: I will go over this matter. I have the transcript and my own notes, and we will mark and consider the matter submitted.

### Certificate of Reporter

I, Official Reporter and Official Reporter pro tem, certify that the foregoing transcript of 37 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ [Indistinguishable.]

[Endorsed]: Filed August 29, 1951. [37]

---

[Title of District Court and Cause.]

### CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellant:



Complaint for damages.

Answer.

Demand for jury trial.

Motion for order permitting defendant to amend answer, etc., filed May 15, 1951.

Affidavit of R. Mitchell S. Boyd, filed May 15, 1951.

Affidavit of Daniel V. Ryan, filed May 29, 1951.

Denial of motion for order permitting amendment to Answer to complaint, without prejudice.

Motion for order permitting defendant to amend answer, etc., filed June 20, 1951.

Affidavit of R. Mitchell S. Boyd, filed June 20, 1951.

Amendment to answer.

Plaintiff's proposed instructions to the jury.

Defendant's proposed instructions to the jury.

Additional instruction given in response to the inquiry of the jury.

Verdict.

Judgment on verdict.

Notice of motion for new trial.

Order denying motion for new trial.

Notice of appeal.

Order denying motion for judgment notwithstanding verdict.

Supplemental notice of appeal.

Supersedeas bond.

Stipulation re supersedeas bond.

Designation of record on appeal.

Four volumes of reporter's transcript.

Plaintiff's Exhibits 1 to 13, inclusive.

Defendant's Exhibits A to C, inclusive.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 30th day of August, 1951.

[Seal]                      C. W. CALBREATH,  
Clerk,

By /s/ C. M. TAYLOR,  
Deputy Clerk.

---

[Endorsed]: No. 13078. United States Court of Appeals for the Ninth Circuit. Southern Pacific Company, a corporation, Appellant, vs. Roger N. Libbey, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed August 30, 1951.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 13078

SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,

Appellant,

vs.

ROGER N. LIBBEY,

Appellee.

APPELLANT'S STATEMENT OF POINTS  
AND DESIGNATION OF RECORD

Agreeably to Rule 19, paragraph 6, of the Rules of the above Court, Appellant Southern Pacific Company, a corporation, makes its statement of points on which it intends to rely and its designation of record as follows:

I.

Statement of Points

The points upon which appellant intends to rely are as follows:

1. The evidence is insufficient to sustain the verdict and judgment, and on that ground the trial court erred in denying the motion of appellant (defendant below) to dismiss the cause at the close of the plaintiff's case and in denying the motion of appellant (defendant below) that the jury be directed to render a verdict in favor of defendant

and appellant and, accordingly, the court erred in denying appellant's motion for judgment notwithstanding the verdict.

2. In amplification of the foregoing and as further statement:

(a) The action was brought under the Federal Employers' Liability Act and said Act had no application in that plaintiff (appellee here) was not an employee of defendant (appellant here).

(b) This was an action under the Federal Employers' Liability Act and there is no evidence that the plaintiff (appellee here) was engaged in interstate commerce within the meaning of that Act, or that any part of any duty of plaintiff was in furtherance of interstate or foreign commerce or in any way or directly or closely or substantially affected such commerce.

(c) At the time plaintiff (appellee here) was injured he had departed from the course of any assumed employment with defendant (appellant here) and was not acting in the course or scope of any assumed employment or for or on behalf of any assumed employer and had departed from directions given to him as to what he should do on or about the premises and equipment of defendant and was acting solely in his own interest and for his own benefit.

(d) Any assumed employment of plaintiff

(appellee here) by defendant (appellant here) was procured by the fraud of the plaintiff in a respect material to entering into any employment relationship and plaintiff falsely represented to defendant that he had not received any injury and was not suffering from any physical disability, and that said representation was false and was known to the plaintiff to be false at the time he made the same, that defendant was ignorant of the falsity of said representation and relied thereon in permitting plaintiff to act as a student fireman, that plaintiff intended defendant should so rely on said representation, that had defendant known the truth defendant would not have employed plaintiff and plaintiff's said fraud had causal relation to the injury for which plaintiff sued.

3. The court erred in denying instructions proposed by defendant (appellant here) as more particularly appears from the objections and exceptions taken to the charge and the refusal of the court to instruct as requested by appellant, all as appears in the transcript of record herein and particularly the court erred in denying defendant's proposed instructions numbers 22 and 23, and erred in refusing to submit to the jury for determination by it the issue whether, assuming plaintiff was an employee of defendant, plaintiff had so far departed from the course and scope of his employment as to be outside of any assumed status of employee and so that the Federal Employers' Liability Act was not applicable.



4. The court erred in excluding evidence offered by defendant (appellant here) and in particular erred in excluding evidence as follows:

(a) Defendant-appellant's Operating Rule No. 864;

(b) Section 16 of Article 51 of the Firemen's Agreement (reporter's typewritten record, p. 224);

(c) Defendant's Exhibit A for identification both as to the whole and as to the separate and distinct offering of the heading and the first paragraph except the last word, the last two lines and the signature;

(d) Evidence by Dr. Walter William Cress, examining physician of defendant, who examined plaintiff prior to the time that plaintiff went on defendant's premises as a student fireman to the effect that had the doctor known of plaintiff's physical condition he would not have accepted him for service or for employment by defendant and that plaintiff's physical condition did not meet the standards for employment set by defendant.

5. The verdict is excessive, as to the amount is unsupported by the evidence as matter of law, was given under the influence of passion and prejudice, and as to amount is excessive.

6. The trial court erred, and was guilty of an abuse of discretion, in denying defendant's motion for a new trial upon the ground that the verdict

was excessive and/or, if the same were to be denied, in not denying it conditioned only on a remittitur.

## II.

### Designation

Appellant hereby designates as all of the record which is material to the consideration of this appeal, and designates for printing, the whole of the certified record on appeal, including exhibits appropriate for reproduction when required to be printed by the Rules of this Court when designated, excepting only the following:

(a) Plaintiff's proposed instructions;

(b) Defendant's proposed instructions except instructions numbers 22 and 23, and these should be reproduced and printed.

Dated September 4, 1951.

/s/ ARTHUR B. DUNNE,  
DUNNE, DUNNE & PHELPS,  
Attorneys for Appellant,  
Southern Pacific Company.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 5, 1951.



No. 13078

---

United States  
Court of Appeals  
for the Ninth Circuit.

---

SOUTHERN PACIFIC COMPANY,  
Appellant,

vs.

ROGER N. LIBBEY,  
Appellee.

---

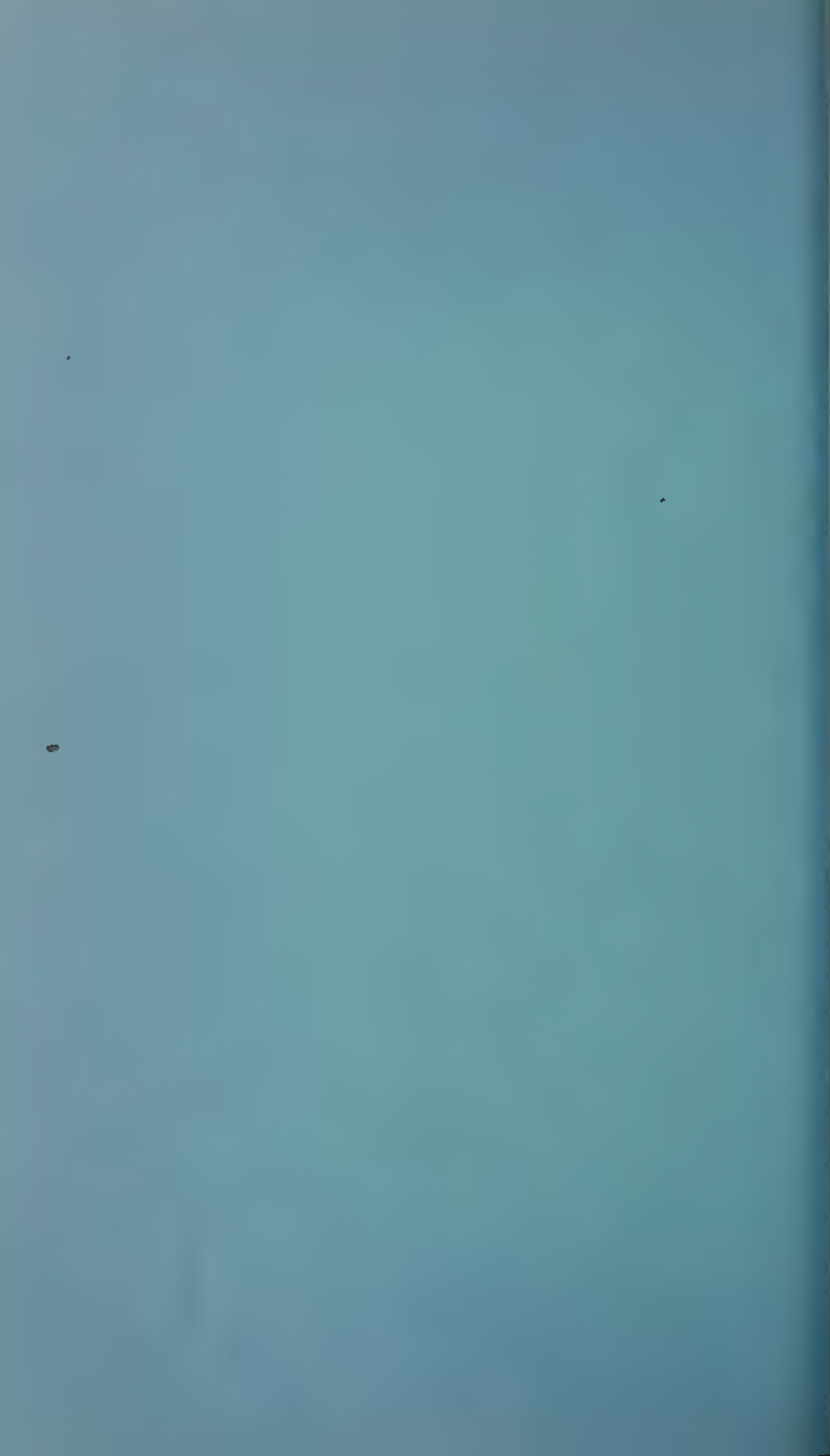
Supplemental  
Transcript of Record

---

Appeal from the United States District Court for the  
Northern District of California,  
Southern Division.

FILED

DEC 12 1951





No. 13078

---

United States  
Court of Appeals  
for the Ninth Circuit.

---

SOUTHERN PACIFIC COMPANY,  
Appellant,  
vs.  
ROGER N. LIBBEY,  
Appellee.

---

Supplemental  
Transcript of Record

---

Appeal from the United States District Court for the  
Northern District of California,  
Southern Division.



In the District Court of the United States, for  
the Northern District of California, Southern  
Division

No. 30085

ROGER N. LIBBEY,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,

Defendant.

Before: Hon. Louis E. Goodman, Judge.

REPORTER'S PARTIAL TRANSCRIPT  
MOTION TO AMEND ANSWER

Appearances:

For the Plaintiff:

RYAN & RYAN, By  
THOMAS RYAN, ESQ.,  
DANIEL RYAN, ESQ.

For the Defendant:

DUNNE, DUNNE & PHELPS, By  
ARTHUR B. DUNNE, ESQ.

(Proceedings had after the selection of a  
jury, not in the presence of the jury.)

Mr. Dunne: If Your Honor please,—

Mr. Thomas Ryan: Before counsel begins, Your  
Honor, may I have an order excluding witnesses  
and excluded especially while he is making this

motion to amend the answer, which I think may be pertinent.

The Court: Any persons you wish to remain inside?

Mr. Thomas Ryan: Just the plaintiff and his wife. The rest I wish excluded.

Mr. Dunne: No objection to that.

The Court: All those who have been summoned as witnesses in this case will remain outside the courtroom until your names are called—those who are summoned as witnesses in this case.

Mr. Dunne: If Your Honor please, the point of this amendment to the answer will become readily apparent if Your Honor will look at the complaint. In Paragraph 3, it is alleged that on the 11th of August, 1950, between the hours of 10 and 11 p.m., thereof plaintiff was employed by defendant as a student fireman at Roseville.

By inadvertence at the time the answer was filed, my office not being fully advised, we admitted that plaintiff was employed by defendant as a student fireman. Also alleges that [2\*] at said time plaintiff was in a certain switch engine, which is not exactly the fact. That is not material. I think there is no dispute, be no dispute between us about the facts, but there is a possible implication that arises from the use of the word "employed" there and a question may possibly arise as to whether or not this man was in fact, if a student fireman without compensation, an employee within the

---

\* Page numbering appearing at top of page of original Reporter's Transcript of Record.

meaning of the Federal Employers' Liability Act.

What we propose to do is to strike out that answer, that sentence and the next sentence, and substitute for it a statement of the facts, that the plaintiff was on our premises as a student fireman agreeably to the provisions of an application for permission to observe operation of locomotives, cars and trains, and we attach a copy of that writing to the complaint.

Now, that Your Honor may be further advised on this matter, and I can't say exactly how the details of the evidence will develop, the authorities would indicate that the mere fact that a man wasn't compensated and the mere fact that in addition to that he was in the process of learning, does not exclude him from the Federal Employers' Liability Act as an employee.

I think this is fair to say that although he is just learning and isn't being compensated at the time, if, in fact, what he is doing is under the control of the railroad and if, in fact, he is performing service at the time and at the time [3] he is doing what in the course of learning he has been directed to do, that he is an employee within the meaning of the Federal Employers' Liability Act; but that if he has deviated from that or perhaps if he has not performed service, he is not, or at any rate that is a question of fact for the jury, or may be a question of fact for the jury.

Now, so far as the pleadings are concerned his status as student fireman is and will be admitted under the amended answer, but what I seek to do



is avoid any possible snarls that may arise from the use of the word "employed" in contradistinction to a statement of the facts.

There is one case in the books that would indicate that if that language stood by itself without any further information as to the detail of what the man was doing that he would be treated as an employee within the meaning of the Federal Employers' Liability Act.

The answer, even in its present form, however, raises the question as to whether or not at the time, at the precise time of the accident he was employed as a student fireman because the only allegation that is admitted is the general one as to general status, and we have also raised the question of interstate commerce. Now, I think those questions will eventually develop themselves in the evidence and those questions Your Honor will rule upon as a matter of law, submit them to the jury. [4]

I suggest that, only suggest to Your Honor that eventually in the course of this trial, to find out exactly what the man was doing, it may become necessary to find out how he was on the premises, what directions he had been given, and the course of the evidence will, in my opinion, in no way be changed by whether this amendment is made or not, and I say the only purpose of the amendment is to remove that possible implication.

Now, there follows with that in the amendment an additional defense for grounds upon the basis of this permission under which the man in the

course of his permission assumes the risk of injury, and we have set up that as a separate defense. I may say to Your Honor, if he is an employee within the meaning of the Federal Employers' Liability Act and there is a case distinctly on this point in the case of a student which was held to be an employee, the agreement, of course, would not be of any effect under Section 5 of the Federal Employers' Liability Act.

The Court: If he was in fact a student.

Mr. Dunne: If in fact.

The Court: Then if an employee, then of course the doctrine of assumption of risk——

Mr. Dunne: Does not apply, and any agreement by which we seek to limit our liability would be void under Section 5 of the Act, if it applies. [5]

The Court: The issue of fact will be whether he was at the time——

Mr. Dunne: The issue of fact——

The Court: ——a student learning and if he was then the Act applies.

Mr. Dunne: That is, if the other facts make the Act apply, that is correct, and unless the facts develop in such a way, of course, there is question, or a question of inference as to what his status was, whether he was performing service, and as I say, it is to avoid a snarl that might arise, some implication, that we tender the amendment.

The Court: Doesn't make much difference whether we allow the amendment or not, we don't pay much attention to the pleadings. If that is

the issue the Court can make an order determining that is the issue of the case, Mr. Ryan?

Mr. Thomas Ryan: Yes, as counsel says there is one leading case in the United States on this question of a student fireman, *Watkins vs. Thompson*, in 72 Fed. Supp. 953 at 959, a decision of Judge Hulen, of the District Court for the Eastern District of Missouri, in 1947, and in that decision Judge Hulen correlates all the cases in the United States, and there are not too many of them on the question of a student employee and whether he comes within the Federal Employers' Liability Act.

Now, and as counsel says, if the man is under the control and under the direction of the railroad, then he is, even [6] though at the particular moment of the accident he might not be doing exactly—for instance, in the *Watkins* case——

The Court: I understand that, Mr. Ryan. Do you object to this amendment?

Mr. Thomas Ryan: I suppose I should on the ground that it comes at the last minute and that the facts were always in the—that the defendant always had the facts in his possession.

The Court: Well, even if he did it may have been inadvertence in not raising that particular issue in the pleadings. I don't think it makes much difference, but frankly, as I say, irrespective of what the pleadings show, if that is one of the issues, why, the Court can make an order, as if in pre-trial, saying that is the issue.

Mr. Thomas Ryan: All right.

The Court: However, I don't urge you to do anything.

Mr. Thomas Ryan: I won't consent to it, but I am not going to argue it, but I might say this, as long as this is almost a pre-trial conference, at the last minute Your Honor might recall we put in two counts, one first being under the Boiler Inspection Act. As Your Honor knows, the Boiler Inspection Act, to apply, the engine must be in use on its line. The facts may or may not develop whether we have a case under the Boiler Inspection Act, or whether it comes only under the Federal Employers' Liability Act, but that is something I [7] think the evidence will have to develop.

Also I may want to amend my complaint at the end to conform to the proof. For instance, we allege that they squirted oil into the boiler, or the firebox and that that caused the flareback. I have since found out that is not correct, they opened the throttle and steam went in there, rather than oil.

Mr. Dunne: We will have no objection to that. That can be gone into, we will not be misled by that, we know what happened in a general way. I don't know the technical aspects of it.

The Court: That is evidentiary.

Mr. Dunne: That is right.

Mr. Thomas Ryan: Also in the complaint, I drew it mostly from what the plaintiff told me, as was told to the jury this morning, a fracture of the tibia and fibula. That is not correct, compound comminuted fracture——

The Court: I think we are trying this as pre-



trial right now. Instead of allowing amendment to the pleadings the Court will order that the issue to be presented to the jury will be the issue raised in the complaint as well as the issue as to whether or not the plaintiff was at the time specified a student fireman, and that will present the whole matter.

Mr. Dunne: That is right.

Mr. Thomas Ryan: That is right.

Mr. Dunne: None of us are mislead as to the facts, no new [8] fact to be brought in here.

The Court: The remainder of the jurors need not remain any longer. Your services will not be required today.

Mr. Dunne: So the record may be clear, that answer will be filed and the amendment to the answer.

The Court: You can file the answer, amendment to the answer. The Court has no objection to your doing that. In view of what we have stated, the issues that will go to the jury has now been stated, irrespective whether you have alleged them in formal terms or not by way of pleadings.

Mr. Dunne: That is right. I will ask it be filed so we can clear the record on that.

The Court: Very well, you may file it.

### STIPULATION

It Is Stipulated that the foregoing is a correct transcript of a portion of the proceedings in the above-entitled Court and cause, not transcribed and



made a portion of the record certified to the United States Court of Appeals for the Ninth Circuit, in Southern Pacific Company, a Corporation, Appellant, v. Roger N. Libbey, Appellee, No. 13078 (see note bottom of page 42 of the printed transcript in No. 13078) and that it may be filed in the United States Court of Appeals in this said entitled and numbered matter as a supplement to the transcript therein and thereafter dealt with agreeably to the Rules of the said United States Court of Appeals.

/s/ A. B. DUNNE,

DUNNE, DUNNE & PHELPS,  
Attorneys for Appellant.

RYAN and RYAN,

By /s/ DANIEL V. RYAN,  
Attorneys for Appellee.

[Endorsed]: Filed November 13, 1951. [9]

---

[Endorsed]: No. 13078. United States Court of Appeals for the Ninth Circuit. Southern Pacific Company, Appellant, vs. Roger N. Libbey, Appellee. Supplemental Transcript of Record. Appeal from the United States District Court, for the Northern District of California, Southern Division.

Filed November 14, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for  
the Ninth Circuit.



No. 13,078

IN THE  
United States  
Court of Appeals  
For the Ninth Circuit

---

SOUTHERN PACIFIC COMPANY, a corporation,

*Appellant,*

VS.

ROGER N. LIBBEY,

*Appellee.*

---

Appellant's Opening Brief

---

ARTHUR B. DUNNE

DUNNE, DUNNE & PHELPS

333 Montgomery Street

San Francisco 4, California

*Attorneys for Appellant.*

NOV 14 1951

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO

PAUL P. O'BRIEN



## INDEX

---

	Page
I. Statement of the Case, Jurisdiction, Pleadings and Proceedings .....	1
A. Jurisdiction .....	1
B. Summary Statement of the Case.....	3
C. The Pleadings.....	5
D. Issues Before This Court.....	6
II. Specification of Errors Relied Upon.....	8
III. Argument .....	29
A. General Statement of the Facts.....	29
B. Appellee Was Not an Employee of Appellant Within the Meaning of the Federal Employers' Liability Act	36
C. The Court Erred in Excluding Evidence on the Issue of Employment.....	44
D. Appellee Was Not Engaged in Interstate Commerce Within the Meaning of the Act.....	47
E. If Appellee Was an "Employee" He Departed from the Course of His Employment. In Any Event the Court Was Guilty of Prejudicial Error Touching the Issue.....	51
F. The Court Erred in Excluding Evidence on the Issue of Fraud in Procuring Permission to Go on Appellant's Premises.....	56
G. The Verdict Is Excessive.....	59
Conclusion .....	61



# TABLE OF AUTHORITIES

CASES	Pages
Atchison, etc. Co. v. Fronk, 74 Kan. 519, 87 P. 698.....	42, 45
Bernstein v. Gross, 58 F.2d 154 (Circ. 5).....	57
Bourne v. So. Ry. Co., 225 N.C. 43, 33 S.E.2d 239.....	7n, 53, 55
Bowman v. Pace Co., 119 F.2d 858 (Circ. 5).....	41n
Breshears v. Callender, 23 Ida. 348, 131 P. 15.....	58
Brown v. Chicago etc. R. Co., 315 Mo. 409, 286 S.W. 45.....	41
Calif. C. I. Exch. v. Ind. Acc. Com'n, 190 Cal. 433, 213 P. 257	53
Chesapeake & O. R. Co. v. Harmon's Adm'r, 173 Ky. 1, 189 S.W. 1136 .....	43, 53
Chicago etc. Ry. Co. v. Bolle, 284 U.S. 74, 76 L.ed. 173.....	48
Chicago etc. R. Co. v. Ind. Com'n, 284 U.S. 296, 76 L.ed. 304.....	7n, 48
Clark v. Union P. R. Co., ..... Ida. ...., 211 P.2d 402.....	56
Cobb v. Lepisto, 6 F.2d 128 (Circ. 9).....	59
Conrad v. Elksen Harvey Co., 120 Va. 458, 91 S.E. 736.....	47
Cooney v. Glide, 97 Cal. App. 77.....	45
Covey-Gas Oil Co. v. Cheeketts, 187 F.2d 561 (Circ. 9).....	59
Dalsheim v. Ind. Acc. Com'n, 215 Cal. 107, 8 P.2d 840.....	53
Dept. of Water and Power v. Anderson, 95 F.2d 577 (Circ. 9)	59
Docheney v. Penn. R. Co., 60 F.2d 808 (Circ. 3).....	40
Douglas v. Washington Terminal Co., 298 F. 199 (Circ. Dist. Col.) .....	40
Findlay v. Coal & Coke Ry. Co., 76 W.Va. 747, 87 S.E. 198.....	42
Ft. Worth etc. Ry. Co. v. Griffith (Tex. Civ. App.), 27 S.W. 2d 351 .....	56
Gaulden v. So. Pac. Co., 78 F. Supp. 651 (N.D. Calif.) aff'd 174 F.2d 1022 (Circ. 9).....	40
Gilbert v. Inter-Ocean Casualty Co., 41 N.M. 463, 71 P.2d.....	58
Gordoy v. Flaherty, 9 C.2d 716, 72 P.2d 538.....	53
Gulf etc. R. Co. v. Graham, 153 Miss. 72, 177 So. 881.....	46-47
Highway Com'n v. Ind. Acc. Com'n, 61 Cal. App. 284, 214 P. 658 .....	53

	Pages
Hull v. Phila. & R. R. Co., 252 U.S. 457, 64 L.ed. 670.....	7n, 39
Huntzacker v. Ill. C. R. Co., 129 F. 548 (Circ. 6).....	40, 45
Illinois C. R. Co. v. Behrens, 233 U.S. 473, 58 L.ed. 1051.....	7n
Ind. Acc. Com'n of Calif. v. Davis, 259 U.S. 182, 66 L.ed. 889.....	48, 49
Ind. Indem. Exch. v. Ind. Acc. Com'n, 86 C.A.2d 202, 194 P.2d 552.....	54
International Trust Co. v. Myers, 241 Mass. 509, 135 N.E. 697 .....	58
Johnson v. So. Pac. Co., 199 Cal. 126.....	6n
Lavender v. Ill. C. R. Co., 358 Mo. 1160, 219 S.W.2d 353, cert. den. 338 U.S. 822, 94 L.ed. 499 and 338 U.S. 881, 94 L.ed. 541 .....	53
Lawrence v. Conn. M. L. Ins. Co., 91 F.2d 381 (Circ. 6).....	58
Louisville & N. R. Co. v. Pettis, 206 Ala. 96, 89 So. 201.....	53
Magruder v. Yellow Cab Co., 141 F.2d 324 (Circ. 4).....	41n
McMillan v. Grand Trunk R. Co., 130 F. 827 (Circ. 1).....	41
Memphis Mining Co. v. Shackett, 153 Ky. 476, 155 S.W. 1154	46
Metropolitan L. Ins. Co. v. Becraft, 213 Ind. 378, 12 N.E.2d 952 .....	57
Millsaps v. Louisville etc. Ry. Co., 69 Miss. 423, 13 So. 696.....	41-42
Minn. etc. R. Co. v. Borum, 286 U.S. 447, 76 L.ed. 1218.....	56
Minn. etc. R. Co. v. Rock, 279 U.S. 410, 73 L.ed. 766.....	56
Mostyn v. Del. L. & W. R. Co., 160 F.2d 15 (Circ. 2—cert. den. 332 U.S. 770, 92 L.ed. 355).....	52
Nat. Auto Ins. Co. v. Ind. Acc. Com'n, 8 C.2d 715, 68 P.2d 361 .....	53-54
New York L. Ins. Co. v. Tuhlenschmidt, ..... Ind. ...., 31 N.E.2d 1000.....	58
New York etc. R. Co. v. Bezue, 284 U.S. 415, 76 L.ed. 370.....	7n, 48
Norfolk & W. R. Co. v. Bondurant, 107 Va. 515, 59 S.E. 1091...	56
Onley v. Lehigh V. R. Co., 36 F.2d 705 (Circ. 2—cert. den. 281 U.S. 743, 74 L.ed. 1156).....	6n
Peccolo v. Los Angeles, 8 C.2d 532, 66 P.2d 651.....	53

	Pages
Rief v. Great Northern Ry. Co., 126 Minn. 403, 148 N.W. 309 .....	42-43, 45
Robinson v. B. & O. R. Co., 237 U.S. 84, 59 L.ed. 849.....	7n, 39, 41n
Scott v. I. A. C., 9 C.2d 315, 70 P.2d 940.....	48n
Shanks v. Delaware etc. R. Co., 239 U.S. 556, 60 L.ed. 436.....	7n, 48
Sheehan v. Board of Police Com'rs, 197 Cal. 70, 234 P. 844.....	59
Smith v. So. Pac. Co., 51 Nev. 390, 277 P. 609.....	52, 55
So. Pac. Co. v. Guthrie, 186 F.2d 926 (Circ. 9).....	59
So. Pac. Co. v. Middleton, 54 F.2d 833 (Circ. 5).....	6n
F. B. Squire, 248 F. 469 (Circ. 2).....	40
Stafford v. B. & O. R. Co., 262 Fed. 807 (N.D. W.Va.).....	56
Stevenson v. Lake Terminal R. Co., 52 F.2d 357 (Circ. 6).....	40
Thompson v. New York L. Ins. Co., 143 Fla. 534, 197 So. 111....	58
United States v. Francis, 64 F.2d 865 (Circ. 9).....	59
Van Drake v. Thomas, ..... Ind. ...., 38 N.E.2d 878.....	46
Walton v. So. Pac. Co., 8 C.A.2d 290, 48 P.2d 108.....	48
Warrior-Pratt Coal Co. v. Shereda, 183 Ala. 118, 62 So. 721.....	45
Watkins v. Thompson, 72 Fed. Supp. 953 (E.D. Mo.—1947).....	37, 40
Weisser v. So. Pac. Ry. Co., 148 Cal. 426, 83 P. 439.....	42
Wright v. Elk etc. Co., 129 Mich. 543, 89 N.W. 335.....	47
Young v. Dep. of L. & I., 200 Wash. 138, 93 P.2d 337.....	55

#### STATUTES AND RULES

Federal Employers' Liability Act (45 U.S.C. § 51 ff.).....	
.....2, 6, 8ff., 14, 15, 47, 49ff., 52n, 53n, 56ff.	
Fed. Rules Civ. Proc., Rule 43.....	58
Fed. Rules Civ. Proc., Rule 73.....	3, 3n
28 U.S.C. § 1291.....	3
28 U.S.C. § 1294.....	3
28 U.S.C. § 2107.....	3
45 U.S.C. § 23.....	2, 6ff.
45 U.S.C. § 51.....	2, 6, 7n, 48
45 U.S.C. § 56.....	2

	Pages
TEXTS	
46 A.L.R. 1230 ff.....	60
102 A.L.R. 1125 ff.....	60
17 C.J.S. 1238, Contracts, § 593.....	46
25 C.J.S. 914 ff.....	60
26 Cyc. 971.....	46n
Wigmore, Evidence, 3 ed. § 10.....	46
Wigmore, Evidence, 3 ed. §§ 377, 2099, 2105, 2115.....	46
6 Williston, Contracts, rev. ed. § 1710.....	46





No. 13078

IN THE

United States  
Court of Appeals

## For the Ninth Circuit

SOUTHERN PACIFIC COMPANY, a corporation,

*Appellant,*

VS.

ROGER N. LIBBEY,

*Appellee.*

## Appellant's Opening Brief

I.

## STATEMENT OF THE CASE, JURISDICTION, PLEADINGS AND PROCEEDINGS

### A. Jurisdiction.

Plaintiff and appellee, Roger N. Libbey, on August 11, 1950, was on the premises of appellant, Southern Pacific Company, at Roseville, California, as a student fireman. He had gone into the cab of steam locomotive No. 2795 (156)<sup>1</sup> with a hostler to watch the hostler move the loco-

1. Otherwise unidentified arabic numerals within parentheses are page references to the printed transcript of record.

motive. When the locomotive started moving, there was a flash-back of fire from the firebox into the cab. Libbey became frightened, jumped out of the window of the cab of the locomotive and was injured. On October 13, 1950, he sued Southern Pacific Company for \$150,000 damages. His complaint purported to go upon two counts, (1) the first under the Federal Employers' Liability Act (45 U.S.C. § 51 ff.) and the Federal Boiler Inspection Act (45 U.S.C. §23), and (2) the second under the Federal Employers' Liability Act alone (3-7). The action was commenced in the United States District Court for the Northern District of California, Southern Division.

The jurisdiction of the court below was claimed to be sustained by a provision of the Federal Employers' Liability Act (45 U.S.C. §56).

The case was tried in the court below, the court sitting with a jury, July 9-11, 1951. At the close of the plaintiff's case, and after defendant had made a motion to dismiss for insufficiency of evidence to warrant submission to the jury, the plaintiff dismissed the first cause of action which claimed violation of the Boiler Inspection Act (248). Defendant's motions to dismiss the case as a whole, made at the close of the plaintiff's case (212-234), and for a directed verdict (266, 267) having been denied (234; 267), the cause was submitted to the jury on the second count under the Federal Employers' Liability Act alone (Instructions 273-288). The jury returned a verdict for plaintiff for \$50,000 (29; 292, 293). Judgment on the verdict was filed and docketed July 12, 1951 (29, 30).

On July 17, 1951, appellant served and filed its Notice of Motion for judgment notwithstanding the verdict and for a new trial (31-33), the motions were heard July 27, 1951

(295-328), and were denied August 2 and 3, 1951 (34, 36). Thereupon, and within the time allowed by law, defendant and appellant perfected this appeal (35-41).<sup>2</sup>

The jurisdiction of this court is sustained by 28 U.S.C. §§ 1291, 1294, 2107 and Fed. Rules Civ. Proc., Rule 73.

## **B. Summary Statement of the Case.**

In August 1950 appellee was 27<sup>3</sup> and had a life expectancy of 40.36 years (211). At the age of 18, after 2 years of high school, he entered the Marine Corps in December 1941 (78). He served at Guadalcanal, where he was wounded October 1943 (52, 104). He received a medical discharge on August 18, 1945 (108) with a disability rating

---

2. On July 31, 1951, the court signed an order denying the motion for new trial. It was filed August 2, 1951 (34). On August 3, 1951, the court signed an order denying the motion for judgment notwithstanding the verdict. This order was filed August 6, 1951 (36). A notice of appeal was filed August 3, 1951 (35). A supersedeas bond, approved by the court, was filed the same day (37-40). Then appellant, being fearful that the claim might be made that the taking of the appeal was premature because the order denying the motion for judgment notwithstanding the verdict was not filed until August 6, 1951, filed a Supplemental Notice of Appeal, on August 10, 1951 (36, 37). Then out of abundance of caution—there is no reason why the bond should not be filed before the notice of appeal, for such a bond would certainly be considered as “filed with the notice of appeal” (Fed. Rules Civ. Proc., Rule 73(c))—the parties on August 17, 1951, stipulated that the bond filed August 3, 1951, was sufficient in form and as to time of filing, the court ordered accordingly, and the stipulation and order were filed on August 20, 1951 (40, 41). All of this was well within the time for appeal.

The entire record was designated and the entire record was designated for printing, agreeably to the rules of this court, excepting instructions proposed and not given but with an exception to this, i.e., designating for printing two of defendant's proposed instructions not given and to the refusal of which defendant and appellant duly accepted (235).

3. Appellee was born August 24, 1923, so that he was just 13 days short of 27 years old at the time he was hurt (44).

of 70 per cent (170). In January 1946 he entered the Army Transport Corps and served in the merchant marine as a wiper and ordinary seaman until the latter part of 1947 or the early part of 1948. During this service he fell from one deck to another deck of a vessel, and fractured his left knee—the knee of the leg which had been seriously injured at Guadalcanal. For this second injury there was a somewhat extended period of hospitalization (79-82). In August of 1948, in an automobile accident, he fractured his left wrist, was hospitalized for 6 weeks and, because of this injury, did not work until February 1949 (105 ff.). It will be necessary, later, to consider these injuries in detail. At the moment it is enough to notice that he had been seriously injured, and hospitalized for each injury, 3 times before he applied to appellant for work.

Meanwhile, after discharge from the Army Transport Corps, appellee endeavored to work. Apparently he was not very successful at holding jobs. In March and April, 1948, he worked for Sacramento Box (83), then April to June 1948 worked on the green chain at a sawmill (83, 84), and then was digging ditches for a mortuary outfit (85). In August 1948 he was in the automobile accident and received the injury that kept him out of work until February 1949. In February 1950—there seems to be an unexplained break from February 1949 to February 1950—he went to work at McClellan Airfield as a mechanic's helper, earning \$190 per month, and was there until August 8, 1950 (75, 77, 103, 104).

On August 9, 1950, appellee applied to Southern Pacific Company Master Mechanic Lonergan at Roseville to be allowed on appellant's premises as a student fireman (45, 110). He was sent to the superintendent's office in Sacra-



mento, there made out an application, was given a physical examination and was sent back to Roseville. On his return to Roseville he reported back to Mr. Lonergan, was sent to Tim Farrell, swing shift roundhouse foreman, and was given instructions by Mr. Farrell (56, 155). Again detailed statement will be necessary and will be made below. That day he followed the fire lighters around on the 3:59 p. m. shift. Next day he was back, again with the fire lighters, until they finished their work, all the fires having been lit. It was then that he went on the engine with hostler Peterson, and the accident occurred (4, 8).<sup>4</sup>

### **C. The Pleadings.**

The pleadings are of little significance. The complaint (3-7) was typical of actions of this sort. The same is true of the answer except for an inadvertent admission that plaintiff was "employed" (8 ff.). A motion to amend the answer, to avoid embarrassment or question, made prior to trial, was denied without prejudice to renewing it (11-18). It was renewed, granted and the amendment was filed (18-26). These proceedings were reported but not originally transcribed (42) and are brought here by supplemental transcript. The amendment was permitted by the judge before whom the case was tried. It was agreed, in effect, in these discussions, by counsel and the court, that all issues presented by the evidence would be tried. All such issues were tried. At no point was there any objection that any evidence offered was not within the issue or that any point

---

4. The time and place are admitted by the pleadings, were testified to by appellee, and as to these matters there never was a question.



raised by either side could not be raised because not properly put in issue.

The short of this matter is that the issues were those which were actually tried in the court below.

#### **D. Issues Before This Court.**

There is now no question of violation of the Boiler Inspection Act. The count in the complaint based upon that Act was dismissed (see p. 2 above).

In this court there will be no issue of negligence or contributory negligence. When the locomotive was started there was a back-flash of fire, from the firebox, into the cab because the firebox door had been propped open with a sand scoop. The door should have been closed. Appellant will not question that this was negligence which was a proximate cause of injury to the plaintiff. The answer set up the negligence of appellee. This question was resolved against appellant by the jury. No question of appellee's negligence will now be made.

The issues here, and the matters about which they revolve, can be stated briefly:

The Federal Employers' Liability Act imposes liability for personal injury only upon a "common carrier by railroad while engaged in commerce between any of the several states" for injury "to any persons suffering injury **while he is employed by such carrier in such commerce.**" (45 U.S.C. § 51).<sup>5</sup> It requires proof by the plaintiff that he is an

---

5. Before 1939 the employee had the burden of proving (*So. Pac. Co. v. Middleton*, 54 F.2d 833 (Circ. 5); *Onley v. Lehigh V. R. Co.*, 36 F.2d 705 (Circ. 2—cert. den. 281 U.S. 743, 74 L.ed. 1156); *Johnson v. So. Pac. Co.*, 199 Cal. 126, 131) that at the very moment of injury,—“at the time of his injury”,—he was engaged “in interstate transportation or work so closely related

“employee”<sup>6</sup> and that at the time of injury he was engaged in interstate commerce within the meaning of the Act.<sup>5</sup> In this case the two matters are closely related. Did appellee present sufficient evidence to warrant submission to the jury of the question whether he was an “employee” and, if so, whether he was engaged in interstate commerce? If he did then on this matter there is a farther question whether the court erred in excluding evidence tendered by appellant and touching upon these issues. (See Assignments of Error Nos. 6 and 7.)

Assuming it was established that appellee was an employee engaged in interstate commerce, so far as his relation in general to appellant was concerned, the next question is whether it did not appear as matter of law that he had departed from the scope of his “employment” so as to make the statute inapplicable or at least a question for the jury which the court should have submitted (it did not). (See Assignment of Error No. 4.) Here is also a question

---

thereto as to be practically a part of it.” (*N. Y., New Haven & Hartford R. Co. v. Bezue*, 284 U.S. 415, 417, 76 L.ed. 370; *Shanks v. Delaware etc. Co.*, 239 U.S. 556, 60 L.ed. 436; *Illinois C. R. Co. v. Behrens*, 233 U.S. 473, 58 L.ed. 1051; *Chicago etc. Co. v. Bolle*, 284 U.S. 74, 76 L.ed. 173; *Chicago etc. R. Co. v. Ind. Com’n*, 284 U.S. 296, 76 L.ed. 304.) By amendment, in 1939, the scope of application of the statute was enlarged in this regard to provide: “Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce **as above set forth** shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce” (45 U.S.C. § 51).

6. *Robinson v. B. & O. R. Co.*, 237 U.S. 84, 59 L.ed. 849: “We are of the opinion that Congress used the words ‘employee’ and ‘employed’ in the statute in their natural sense, and intended to describe **the conventional relation of employer and employee.**” This language was approved in *Hull v. Phila. & R. R. Co.*, 252 U.S. 457, 479, 64 L.ed. 670, 673. See the *Bourne Case*, p. 55 below.

whether the court should have admitted evidence bearing on this issue and offered by appellant. (Assignment of Error No. 5).

Thirdly: Appellant raised the point that appellee induced his claimed relationship with appellant by perpetrating a fraud that went to the heart of the claimed relationship. As to this there was probably a jury question. Assuming that there was, there is a question whether the court properly excluded evidence offered by appellant (Assignment of Error No. 8).

Finally, there is a question whether the award was not so excessive that this court should give relief.

It is believed that the foregoing statement of the question, in general form, when taken with the specification of errors, will sufficiently indicate what we propose to argue.

## II.

### **SPECIFICATION OF ERRORS RELIED UPON**

1. The court erred in denying appellant's motion for a directed verdict and motion for judgment notwithstanding the verdict upon the ground that there was no evidence to show that appellee was an "employee" or engaged in interstate commerce within the meaning of the Federal Employers' Liability Act.

2. The court erred in denying appellant's motion for a directed verdict and for judgment notwithstanding the verdict upon the ground that it appeared as matter of law that appellee had departed from any assumed employment at the time he was injured.

3. With respect to the question of departure from any assumed employment the court erred in ruling as matter

of law that he had not so departed and that there was no evidence to make an issue of fact for the jury upon this and in refusing to submit this issue to the jury. (See Assignment of Error No. 4 and see remarks on argument of motion for new trial (311, 312).)

4. The court below erred in denying appellant's proposed instructions Nos. 22 and 23 which would have submitted to the jury the question whether appellee had departed from any assumed employment so that the Federal Employers' Liability Act was inapplicable at the time of his injury. The requested instructions are set out in the printed record at pp. 26 and 27. The proposed instructions are as follows:

#### “DEFENSE INSTRUCTION No. 22

“Event if plaintiff is considered as having been employed by the defendant when he went upon the defendant's premises as a student fireman because he performed service for the defendant, still if you find that under the instructions of the foreman in charge the plaintiff on the shift on which the accident happened was instructed to accompany the fire lighters and learn to light fires and for his own benefit and convenience and in his own interest and without any instructions from defendant, and not for the purpose of performing any service for the defendant, deviated from the line of activity designated for him on his shift and went upon the locomotive, he then departed from the course and scope of any employment, and if he was injured while he was so in the course of departure, your verdict must be in favor of defendant Southern Pacific Company.



## "DEFENSE INSTRUCTION No. 23

"If you find that in going upon the locomotive the plaintiff did so either on the instructions or at the request of Hostler Petersen, and Petersen did not request him to do so because of any emergency or to perform any service, but solely in order that plaintiff, for his own benefit, might observe the operation of the locomotive, then I instruct you that such direction or request or invitation from Petersen could not and did not obviate or modify or set aside any earlier and contrary instructions, if any, or any other instructions as to what plaintiff should do, given to plaintiff by the foreman in charge, and any such direction or invitation from Petersen was not an instruction to perform service on behalf of the defendant."

At the trial error was assigned (290) as follows:

"Mr. Dunne: You Honor, please, we respectfully except to the refusal of defense proposed instructions Nos. 22 and 23. No. 22 is the Harmon case, told the Jury even if this young man was in a status of employee, if, on a particular occasion when he was injured he had departed from the course of his instructions in his own interest and benefit and deviated from the line of activity designated on the shift and went on the locomotive, then he had departed from the course and scope of any employment and could not recover.

"And in connection with the same thing, Instruction No. 23, hostler Petersen had no authority to set aside or modify any earlier directions or instructions which the plaintiff may have received by requesting him to go upon the locomotive and that a request from Petersen or an invitation from Petersen did not obviate or set aside earlier or contrary instructions.



"The Court: Are those the only two?

"Mr. Dunne: Only those.

"The Court: I purposefully did not give those instructions and you may have it for the record so that you may have it for your protection as well, because I did not feel the facts of this particular case justified the giving of that instruction, not because I had any particular quarrel with that as a statement."

5. The court erred in excluding Rule 864 of the Transportation Rules of appellant offered by appellant, after the circumstances had been shown (see p. 30 ff. below), on the question of appellee's departure from the course and scope of any assumed employment by going upon locomotive 2795 (237 ff.).

"Mr. Dunne: I think that is all I have at the moment. I will have two rules. I will call counsel's attention to them; one of which bears on this matter of employment, and the other which bears——

"The Court: Hadn't you better present that when the jury is here?

"Mr. Dunne: Yes, I want to do that, but simply want to ask Mr. Ryan, I assume he will give me the accommodation, if I can read them, if otherwise relevant, Rule 864 of the Transportation Rules, that is, unauthorized persons not to be allowed on moving locomotives.

"Mr. Ryan: I don't know it offhand.

"Mr. Dunne: You don't want me to bring a witness to prove that——

"Mr. Ryan: Absolutely not. I have a book." (236, 237).

"Mr. Dunne: Now, how about that Rule 864?

"Mr. Ryan: Do you have it with you?

•"Mr. Dunne: Yes.

"Mr. Ryan: Oh, I am going to make an objection. Trying to read this afternoon?" (240)<sup>7</sup>

"Mr. Dunne: 864.

"Mr. Ryan: The other one. Well, I am going to object to this rule being read on the ground it is not applicable.

"The Court: What rule are you referring to?

"Mr. Ryan: Referring to Rule 864 of the Rules and Regulations of the Transportation Department. It reads as follows:

'Persons must not be permitted to ride on an engine or in a baggage, mail or express car without a written order from the proper authority, except employees in the discharge of their duties and those holding transportation endorsed to that effect.'

"I submit that is used to keep tramps and unauthorized persons, outside people off the engines and——

"Mr. Dunne: Student firemen in the roundhouse.

"Mr. Ryan: 'Except employees in the discharge of their duties.'

"Now, under the Watkins case it holds that the student fireman, while observing, is in the discharge of his duties and that's what Mr. Libbey was on that engine 4, because he testified that——

"The Court: I don't think you need to labor that. I am inclined to think that the rule is not pertinent, Mr. Dunne, to this matter, because the relationship—it is clear from the document and testimony that that

---

7. In the absence of the jury appellant offered Rule 864 and Section 16 of Article 51 of the Fireman's Agreement. At this point Rule 864 was being offered but counsel on the other side at this precise point started with his discussion of, and objection to, Section 16 of Article 51 of the Fireman's Agreement. See (240). This matter is set out in Assignment 7 below to the rejection of the provision of the Fireman's Agreement. The continuity is indicated in these Assignments by picking up the first sentence of his objection. See footnote 9 below.

is what the young man was there for, to make observation. He had to do that by getting on the engine.

"Mr. Ryan: Had to do that to light the fires and watch the fire lighters.

"Mr. Dunne: I want to make the record clear that our point is that the only evidence in this case is that he was instructed to accompany fire lighters. He had no instructions of any kind to ride on a moving locomotive. There was no evidence that fire lighters ever are on moving locomotives or have any function on moving locomotives. Our position is that until he had finished his two turns in the roundhouse, his only function was to accompany the fire lighters as told and he was going outside of the scope of his instructions, duties, or whatever they may be called, when he got on to an engine to watch an engine to be moved.

"Mr. Ryan: The answer is that Libbey's testimony where he said the roundhouse foreman Farrell had told him as follows, and I quote:

'Keep your eyes and ears open and learn everything you can about being a fireman.'

One thing he had to learn about, being a fireman, was how his engine was operated, because indeed it is firemen who act as hostlers in movements.

"The Court: Well, I don't think you need to labor the point. I personally doubt that it would have any pertinency here. It is obviously intended to cover other situations than that of a person learning to be a fireman. In and of itself the presence of the young man as an observer on the engine certainly is innocuous, no matter what stage of the proceeding, of his learning. I would rather think that would be a forced and unfair interpretation.

"Mr. Dunne: Of course, it is also a restriction on any authority, any invitation from Petersen offering it in that connection, too.

"The Court: I will sustain the objection to that. It has been read into evidence so that——

"Mr. Dunne: It has been read in the record.

"The Court: Read in the record.

"Mr. Dunne: May that reading serve as my offer?

"The Court: That may serve as your offer, and I will sustain the objection." (243-245)

6. The court erred in excluding appellant's Exhibit A for identification, offered after the circumstances had been shown (see p. 30 ff. below), on the question whether appellee was an employee of appellant within the meaning of the Federal Employers' Liability Act and in this regard erred both in rejecting the document as a whole and in rejecting the first paragraph which was separately offered (25, 26; 111-113; 214 ff.).<sup>8</sup> This is the record:

"Q. Let me show you this paper and ask you if the signature 'Roger Norman Libbey' is your signature?

"A. Yes, sir.

"Q. And that was signed by you at Sacramento on the 9th of August, 1950?

"A. Yes, sir.

"Q. Now, was that when you first went there or after you came back from the doctor?

"A. I believe it was after I went to the doctor, because it says, 'I assume all risk,' and everything.

"Mr. Dunne: All right, we will offer this as our next exhibit in order.

"Mr. Ryan: Your Honor, I object to that on the ground it is incompetent, irrelevant and immaterial,

---

8. The document which became defendant's Exhibit A for identification is the document copy of which was attached to appellant's Amendment to Answer (23-26). It is printed as part of the Amendment to the Answer (25-26) and, therefore, in printing the record was not reprinted.



and it will revolve around the points of law that we will have to discuss later with your Honor. I object to it specifically on the ground that it is irrelevant, because it is given in violation of Section 5 of the Federal Employers Liability Act, and I won't argue it now, but just state that.

"Mr. Dunne: Counsel went in very fully to what happened at the time he first made application. Now this is part of that same story.

"Mr. Ryan: Yes, but, your Honor, I submit, I will go into that, that a waiver such as is contained there is against the policy of the law and is illegal, as a scheme or device to try to avoid liability in cases of this sort. And Section 5 of the Federal Employers' Liability Act specifically prohibits those kind of contracts being legal.

"Mr. Dunne: That's if there is employment under the Act.

"Mr. Ryan: Yes.

"Mr. Dunne: We haven't reached to that question yet.

"Mr. Ryan: But I submit that he has already, the testimony so far shows that he was an employee, and under that case that I cited to your Honor, a student fireman is an employee under the circumstances such as these.

"The Court: Well, all this is a waiver, an exemption.

"Mr. Dunne: Well there is also some recitation at the beginning of that which may reflect on what the relationship was. That is a question as yet to be determined, and it can't be determined by telling half the story.

"The Court: Well, I will reserve ruling on that. The only point is whether or not this should be read



to the jury or given to the jury at this time or not. The plaintiff just said that he signed it. We will mark it for identification as No. A for the defendant, and I will reserve ruling on it, whether it should be admitted. Defendant's Exhibit A.

"The Clerk: Defendant's Exhibit A marked for identification.

"(Whereupon document identified above was marked defendant's Exhibit No. A for identification only.)"  
(111-113)

"Application for Permission to Observe Operations of  
Locomotives, Cars and Trains

"Whereas, I, the undersigned, Roger M. Libbey, residing at Citrus Heights in the State of California, and being 27 years of age, have applied to Southern Pacific Company for permission to enter and ride upon the locomotives, trains and cars of said Company for the purpose of observing the operations of the railroad of said Company **with the understanding that I shall be under no obligation to perform any work or service upon said railroad until employed by said Company,** and that neither said Company nor I shall be under any obligation with respect to my entering the employ of said Company at any time, and

"Whereas, said Company is willing to grant my request upon the understanding above expressed, subject to the further condition that I assume all risks of injury which may be sustained by me while upon the premises of said Company or while riding its locomotives, cars or trains,

"Now, Therefore, in consideration of said Company granting my said request, I do hereby assume all risks of injury which may be sustained by me while upon or about the property or premises of said Company, and I hereby release and discharge said Company, and the

officers and employees thereof, from any and all claims, demands, suits and liabilities of any kind for death or for any injury that I may sustain while upon or about said property or premises.

“Signed at Sacramento, State of California, this 9th day of August, 1950.

“ /s/ ROGER NORMAN LIBBEY.

“Witness:

“ /s/ M. PALMITER.” (25-26)

“Now the second matter, which I don’t know whether it is appropriate at this time or should be ruled on, but I want to renew again the offer of defendant’s Exhibit A. That, your Honor may recall, is this form of application to observe the operation of locomotives, cars and trains. It is the one in which that——

“The Court: Yes, I understand.

“Mr. Dunne: You understand that. Now of course the question arises as to whether or not the provision as to assumption of risk would be valid. As I suggested to your Honor, if it is determined conclusively that this man was an employee and the Act applies, then that is obviously not good under Section 5.

“The Court: I don’t see that there is really any point to that, Mr. Dunne, because to admit it would require a holding that the Act does not apply, and if the Act does not apply, then of course the defendant is not liable. So isn’t that the [194] situation?

“Mr. Dunne: But isn’t there a question of fact for the jury to determine whether this man was employed?

“The Court: Well, if the jury decides that he was——

“Mr. Dunne: Employed——

"The Court: —an employee, then this would not be applicable.

"Mr. Dunne: That's right.

"The Court: But if the jury decides that he was not an employee, then the verdict would have to be for the defendant.

"Mr. Dunne: For the defendant anyway.

"The Court: So I don't see how that——" (214, 215).

"The Court: If the plaintiff were not an employee, then the action fails. And if he was an employee, then under the Federal Employers Liability Act, Section 55, I think it is—45 U.S.C. 55, then this agreement would be invalid.

"Mr. Dunne: That's right. If he were an employee. There is no question about that, your Honor.

"Now then, in view of that I offer separately and severally as a distinct offer, the heading on this document, the first paragraph, excepting the last word 'and' which indicates that it carries on to something else. And then the last two lines, which is the place and the date, and then the line for the signature.

"Now that is an independent order; if your Honor will look [at] it, you can see it will bear specifically on this question of fact as to whether or not this man is an employee.

"The Court (Examining): You say the last paragraph?

"Mr. Ryan: No, just the first paragraph.

"Mr. Dunne: Yes, the first paragraph, and then of course, enough to pick it up for the signature and the date.

"The Court: Well, I don't think that dissecting the document in that way would amount or would have any meaning, or, inasmuch as there were other docu-

ments that were signed and are now in evidence, that fix the conditions and show the purpose of it, show the relationship between the plaintiff and the defendant——

“Mr. Dunne: Well, those, I think not, your Honor; there are applications, and only in a remote sense. Now this is a document that is part of the same transaction. It bears on the relationship that the parties bore to each other. In other words, the circumstances under which he was on the premises. In his agreement to the provisions of that first paragraph, the least that can be said of them is that they are one item of fact.

“The Court: That I don’t agree with you on, but the paragraph has no meaning unless it is a whereas clause, unless it is connected with the purpose and objective of this document, which is for the purpose of waiver of assumption of risk. I don’t think you could take out of a document that is intended for that purpose something that applied for a different purpose.

“Mr. Dunne: Well then, the whole thing ought to come in with an instruction from your Honor as to when the assumption of risk provision is good and when it is not good; because we can’t dissect the facts. It is part of the facts.

“The Court: Well, it seems to me that the interests of justice require that this document be not admitted into evidence. I don’t see that it serves any useful purpose, because as I say, it is determined that the plaintiff was covered by the Act, that the Act did apply—if that is determined, then the document itself wouldn’t be invalid under Section 55 of the Act. And if, of course, it is determined that he was not an employee, and the Act doesn’t apply, then the Court would have to instruct for a verdict for the defendant in the case, irrespective of Mr. Ryan’s contention that he might



still proceed in a common law action. So for that reason, I think——

“Mr. Dunne: So there will be no mistake on the record as to my offer, I am offering it now both as a whole and as to that first paragraph, as a separate offer, as one of the items of fact going to show what the relationship between the plaintiff and the defendant was at the time he was in the roundhouse.

“The Court: Yes, I understand the full purpose of the offer, and I will hold that for neither purpose is the document admissible—neither in whole or in part.” (218-220).

7. The court erred in excluding a portion of the “Firemen’s Agreement” offered by appellant after a showing of the circumstances and as bearing on the question of appellee’s status (237 ff.).

“Mr. Dunne: I think that is all I have at the moment. I will have two rules. I will call counsel’s attention to them; \* \* \*. And the same thing, I think it is Section 6 or 16 or [of] Article 51 of the Firemen’s Agreement.

“Mr. Ryan: Article 51, got it here?

“Mr. Dunne: Yes. It is the 90-day provision. There is a provision under the Fireman’s Agreement, if your Honor please, that once these men have passed, taken all their student trips and otherwise qualified, they are hired and go on pay, and then thereafter, Section 16, there is a 90-day period in which we may terminate their services without cause for any reason, and if we don’t do it within that 90-day period, then we can terminate only for cause and under the provisions of the Act. I offer it to show that there are three gradations in this matter of permanent employment, the student status, whatever that may be, temporary status, 90



days, and then permanent status. It is a matter, I think, which probably [ad]dresses itself more to your Honor than to the jury. As a practical matter that is what the section is, the Firemen's Agreement. I just wanted to know whether counsel wanted me to call a witness.

"Mr. Ryan: You won't have to call anybody to identify, I will admit the Agreement, but still reserve my right——

"Mr. Dunne: That is right." (237 238).

"Mr. Ryan:<sup>9</sup> Oh, I am going to make an objection. Trying to read this afternoon?

"Mr. Dunne: Whenever——

"Mr. Ryan: For instance, want to object to this latter sentence, latter part of it says——

"The Court: What are you reading, so the record is clear?

Mr. Ryan: Reading now from the Firemen's Agreement that counsel handed me.

"The Court: What section?

"Mr. Ryan: Section——

"Mr. Dunne: 16 of Article 51.

"Mr. Ryan: Of Article 51. The last sentence reads as follows:

'When applicant is not notified to the contrary within the time stated, it will be understood that the applicant becomes an accepted employee, but this rule shall not operate to prevent the removal from service of such applicant, if subsequent to the expiration of 90 days it is found that information given by him in his application is false.'

"Now, I am going to object to that on the ground that it is incompetent, irrelevant and immaterial and self-serving on several grounds. Number one, he was

---

9. See footnote No. 7.

not a fireman at the time this accident happened, he was a student fireman, and the agreement wouldn't even begin to cover him until such time as he had passed the examination and been accepted by the company as a fireman. Secondly, I say that it is, further, that information given by him in his application is false, even under the law and even under that agreement they couldn't fire him unless that was a material allegation, and I submit that after their own company doctor had accepted him and passed him with knowledge of his injuries and knowledge of his compound fracture in the other leg they would waive any such finding.

"The Court: Mr. Dunne, how is the provision of the Firemen's Agreement applicable here? Does it specifically say that it applies to student firemen?

"Mr. Dunne: As a matter of fact, your Honor, it does not. The Firemen's Agreement does not apply to student firemen. There have been all sorts of discussions before all sorts of bodies about that, but it does not. At this time I am not offering it for what counsel seems to be bothered with, I am offering it for the purpose of showing that between a student fireman and a permanent employee there is still an intermediate stage of temporary employment and I say to your Honor that I am calling attention to the existence of this rule because it has—attention has been called to it in some of the cases that have distinguished this question of fraud and have indicated that the man even though he has passed beyond that 90-day period, that they had—

"The Court: The company still has the right to—

"Mr. Dunne: That is right.

"The Court: Not to complete his employment?

"Mr. Dunne: That is right.

"The Court: On that ground.

"Mr. Dunne: And it is in connection with that that I am offering the rule.

"Mr. Ryan: I will object on the ground it doesn't apply to the plaintiff in this case because he was not a fireman and not a party to the agreement.

"The Court: I think that the precise provision in this agreement would be subject to Mr. Ryan's objection. The subject matter that you are discussing, however, might be presented in some manner to the jury, but I don't think this rule, that it would be competent to read the rule and agreement that it is not applicable.

"Mr. Dunne: May Mr. Ryan's reading of the rule be taken as my offer of the rule, then?

"The Court: Yes, I will sustain the objection." (240-243).

8. The court erred in rejecting the testimony of Dr. Cress,<sup>10</sup> offered by appellant, that had the doctor known of appellee's prior injuries and their residual effects he would not have permitted appellee to act as a student fireman. After showing the circumstances (see p. 30 ff. below) appellant offered this testimony as follows:

"Q. (By Mr. Dunne): Now, Doctor, you have been doing this work for a great many years, have you not?

A. About twenty-eight years.

"Q. I want to assume this: I want to assume that in 1950, in August of 1950, a man came to you who is applying for employment as a fireman and that at that time he had a disability service-connected as the result of a war wound, a piece of shrapnel having gone into his left leg at about the middle third, resulted in a fracture of the femur; that he had been hospitalized for that for something over a year; that it had healed with

---

10. Appellant's physician who examined Appellee as an applicant for employment. See p. 32 below.

a slight deformity; that it had left him with scars; that it had left him with a slight restriction of motion of the left hip; that it had left him with a slight restriction of motion of the left ankle; that it had left him with a restriction of motion of the left knee; that thereafter he had fallen and fractured the patella of the left knee, the left kneecap, and had been hospitalized for that; and that in 1950 he was suffering from restriction of motion of his left knee so that he didn't have full bending of it, and some atrophy of the left leg and a slight restriction of motion in the hip and in the left ankle; that that was, the injury had been received in 1943, there had been a long recuperation, something over a year of hospitalization, and then some gradual improvement in the condition.

"Now, examining a man for a fireman, if you had known those facts, would you have passed that man for a fireman?"

"Mr. T. Ryan: Just a moment. I make two objections to that: Number 1, that he is asking for a self-serving declaration on the part of one of their defendants, he is attempting to impeach the Doctor's own medical examination of the man, knowing about the fracture and observing with his own eyes the wounds made by the shrapnel; secondly, and entirely aside from that objection, as a second objection, as far as the hypothetical question is concerned, I object to it on the ground that he has left out some very vital factors which would have affected the doctor's medical decision, to wit: That the man had improved to such an extent that the United States Government, through the Veterans Administration, had reduced his disability from 70 per cent to 35 per cent to 10 per cent and he had only had a 10 per cent disability at the time of this physical examination whereby he was getting \$15 a



month from the Government; and thirdly, he left out this vital factor which would play an important part in the doctor's opinion, the fact that the man, prior to seeking to employment with the Southern Pacific Company, had been doing hard physical labor in the nature of working eight hours a day digging ditches with a pick and shovel; that he had worked in a logging camp doing heavy work, that he had done stevedore work in the nature of loading and unloading cargo from both freight cars and boats, and that he had worked both as a wiper in the engine room of vessels where he was required to work in very cramped quarters and that he had worked as an ordinary seaman on vessels, and that he was able to walk with the disability in that left leg as much as seven miles a day.

"Mr. Dunne: I will add those factors to the question.

"Q. Doctor, did you hear what Mr. Ryan said?

"A. Yes, sir."

"Q. I will add those, too, to the factors he has accurately stated what some of the testimony is on that regard, take all those factors into consideration and with it in mind that this man, applying for the job of fireman, would you have passed that man?

"Mr. T. Ryan: Just a moment. I have no other objection, the first one, which was apart from the second one, that it calls for a self-serving declaration on the part of the Southern Pacific Company, and also an attempt to impeach his own physical examination which shows on the face of it that he saw the injury that the man had and knew of his compound fracture.

"The Court: Well, I think that this is not the field, Mr. Dunne, for the expert testimony. The casual relation of this man to the employment is a factual question for the jury to decide. I don't see that it is possible for expert testimony on the part of the examining



doctor; it would result in opinion and a conclusion which would be self-serving and would decide the matter rather than leaving it as a question of fact.

"I will sustain the objection.

"Mr. Dunne: Respectfully note the exception.

"Q. Now, Doctor, assuming that same set of facts—if your Honor please, I don't want to persist after your Honor has made the ruling, but I do want to make a record.

"The Court: Yes.

"Mr. Dunne: And there is, although the objection hasn't been put on the ground—I would like to put another question on that same set of facts.

"Mr. T. Ryan: Your Honor, ask the witness to wait until I make the objection, then, before he answers?

"The Court: All right.

"Q. (By Mr. Dunne): Now, Doctor, I want to assume that same set of facts and on that same set of facts put this question to you: Would such a man meet the standards of physical condition that were set for acceptance as a student fireman and for employment as a fireman?

"Mr. T. Ryan: Just a moment, object to that on the ground that that calls for the conclusion and opinion of the witness and calls for a self-serving declaration and also serves as an attempt to impeach his own medical examination when he had that information about his injuries and thirdly, on the ground that the answer would usurp the province of the jury in this case.

"The Court: Well, for the same reasons I will sustain the objection.

"Mr. Dunne: I have no further questions.

"I want, in this connection, if your Honor please, to make an offer of proof. Of course normally I should

do it with the witness on the stand. I assume it would not be proper to make it in the presence of the jury, but I offer to make the offer now and at the appropriate time I will enlarge on it.

"The Court: You may do that. I don't think it is necessary to preserve your record, because it is in the nature of questions.

"Mr. Dunne: I think that is perhaps true, but I would like to complete the record." (254-259)

"By Mr. Dunne:

"Q. Of course, that only takes up part of what you knew, Doctor, so let's take that entry and read the rest of it, follow the line of questions that Mr. Ryan put to you, 'Resulting compound fracture femur during early childhood.' That would also indicate to you what whatever this condition was he had overcome it and had gone through a good many years of it without it bothering him?

"A. That's right.

"Q. And if you had such a history, Doctor, having found out that a man had had a compound fracture of the femur in early childhood and had learned then that after that he had been accepted by the Marines, served with the Marines on active duty in a combat area, would such a history affect your opinion as to the results of any such fracture in early childhood?

"Mr. T. Ryan: Object on the grounds that it calls for the opinion and conclusion of the witness, as a self-serving declaration on his part, attempting to go against his own observations of the man in his physical examination, and on the ground that it usurps the province of the jury, speculative, and also not proper redirect.

"The Court: Well, I still think, Mr. Dunne, that is a jury question, rather than an opinion testimony of

the witness as an expert as to his opinion. It is for someone else to say that was of the nature that would affect his opinion rather than for him to say, because at best it could, it would only be in the hypothetical field.

"I will sustain the objection.

"Q. (By Mr. Dunne): And, Doctor, in arriving at a conclusion, forming an opinion as to the physical condition of the man and whether he should be accepted, this is as a matter of medical practice, is the history which is given to you by the man a matter which you, as a doctor, takes into consideration in arriving at your conclusion?

"Mr. T. Ryan: Object to that on the ground that that is incompetent, irrelevant and immaterial.

"The Court: Of course, that is a general question, he hasn't asked it with reference to this case.

"Mr. T. Ryan: No.

"The Court: I see no objection, no basis for the objection, and I will overrule the objection.

"The Witness: Question? I didn't get the question.

"The Court: All doctors take into account in making a diagnosis the history of the case.

"The Witness: Yes, sir.

"The Court: We all know that.

"Q. (By Mr. Dunne): And, Doctor, as a medical man, when a history is given to you and it is given to you untruthfully can you be misled as well as anybody else?

"Mr. T. Ryan: Object to that, that is leading and suggestive.

"The Court: Yes.

"Mr. T. Ryan: Calls for the conclusion of the witness.

"Mr. Dunne: I have no further questions.

"The Court: Sustained." (263-265)

"Mr. Dunne: Now, if your Honor please, to complete the record, and in respect to those first questions that were asked, which your Honor sustained the objections to, of course, my position is, in asking those questions, to complete the proof, my proving the ultimate fact that there are certain standards of physical condition that a man, such as described in the hypothetical question, would not meet those standards, if known, and applied by the doctor, and that in fact the defendant was misled by these misrepresentations, because had the doctor been told, then under the standard as set forth and under the practice of the doctor, such a man would not have been accepted as a fireman, for the purpose of showing reliance and being misled by the misrepresentations." (266)

9. The court erréd, and abused its discretion in denying appellant's motion for a new trial, upon the ground that the damages awarded were excessive in fact, and as matter of law, that the award, as to amount, is not supported by the evidence and was the result of passion and/or prejudice.

### III.

#### **ARGUMENT**

Some amplification of the facts is now necessary.

#### **A. General Statement of the Facts.**

Appellee's earlier injuries (see p. 3 above) were serious and permanently disabling. The injury of October 1943 was the result of being struck by shrapnel which shattered the femur or thigh bone of the left leg. It required removal of pieces of bone and hospitalization until Christmas of 1944. Appellee used crutches even for a time after



he was discharged from the Marine Corps in August 1945 (79). At the time of his discharge he was given a 70 per cent disability rating, later cut to 35 per cent. In August 1950, when he applied to appellant, he still had a 10 per cent disability rating (51 ff.; 76; 104 ff.). The fracture of the left knee while he was in Merchant Marine service likewise required an extended period of hospitalization (p. 4 above). He said, of the residual effects, that he had trouble in bending his knee, and his thigh was stiff (110). His physician, called to testify at the trial, described the condition of his left leg as follows:

“I found also evidence of a disability of this patient’s left lower extremity which was due to an injury he sustained in 1943 while in the Marine Corps. This injury also consisted of a fracture of his left femur and healed with restriction of left knee motion with a slight restriction of left hip motion, with no shortening, and I think very slight restriction of left ankle joint motion.” (126)

He further testified that there was some bowing of the left thigh, some anterior-posterior instability of the left knee and that appellee had a congenital abnormality in his lumbar spine (140). He was not fitted to be a fireman.

The duties of the position for which appellee was applying called for some agility. A fireman does not just sit in the cab on a locomotive. Beyond handling the fire and water controls and keeping a lookout, he is called upon to do the following: He must take water and oil. To do this he must climb on the tender, open the manholes and then with a hook pull over the water column. He must climb the front of the locomotive and change the markers and indi-



cators and climb the rear of the tender and change and put up markers when the locomotive is running light. When the locomotive is running light, he must close switches and flag under Rule 99. On the Sacramento Division locomotives are used in helper service—extra locomotives helping trains up a grade—and when the helper service is completed the locomotive returns light to its base (201-203).

At the superintendent's office, in Sacramento, to which appellee was sent by Master Mechanic Lonergan (see p. 4 above), there was made out, and appellee signed, an application for employment. So far as we are concerned with it the parts were filled out by appellee, in his own handwriting, and the applications were then dated August 9, 1945, and signed by him. (Def. Ex. B (111 et seq.; 170); Def. Ex. C (149, 150; 169).) In these applications appellee deliberately and knowingly made materially false statements. He conceded that they were false and that he knew they were false when he made them.<sup>11</sup> The misstatements were of such character that the concessions could not be avoided. These are the false statements:

1. To the question asking for his schooling (the school, location, time attended, whether graduated and major subject) he answered: "Sylvan Grammar

---

11. One of these misstatements appellee attempted to explain away on the ground of the misunderstanding of the question. The explanation was completely hollow. The others he attempted to explain away on the ground that he had told the fact either to Mr. Lonergan or to Dr. Cress. At best this created a conflict. We are not concerned here with the resolution of conflicts or whether the evidence is sufficient to support the verdict, but solely whether the Court committed error in excluding other evidence on the issue of fraud. It is not necessary, therefore, to state the plaintiff's testimony. It is enough, for the present purposes, to indicate that there was a conflict, not on the issue of false representation, but on the issue of reliance.

School, Citrus Heights, eight years; graduated, yes; major subject, grammar" and four years of high school and graduated (143, 144). The statement as to high school education was false and he knew it (78, 144, 145, 146).

2. To the question "Have you ever been **injured or** suffered an amputation? If so, state how, when, where and the nature thereof" he answered "No" (147). Obviously the answer was false and known to him to be false, and he finally conceded "that was an untruthful answer? A. Yes sir." (147)<sup>12</sup>

3.<sup>13</sup> To the question "Have you ever received a pension or disability rating from any government or organization? If so, give details" he answered "No" (151). The answer was obviously false and known to him to be false. At the very time he was receiving disability payments from the United States (151).

4. To the question "Have you ever been confined to a hospital for surgical operation or following an injury? If so, give details briefly" he answered "No" (151). The answer was false and known to him to be false when he made it (151).

Appellee was then sent to the company's examining physician, Dr. Cress, and took the application with him (151, 152). The doctor gave him an examination (152) and in his presence filled out other parts of the application (167). He then circled the application as accepted and gave it to appellee to bring back to the superintendent. Appellee did this (167). Upon the application, in the doctor's hand-

---

12. These two questions and answers are on Defendant's Exhibit B.

13. This question and answer and the next one are on defendant's Exhibit C.

writing, appears "multiple scars left thigh and slight deformity left thigh. Result of compound fracture of femur during early childhood." The doctor had no independent recollection of the occurrence but, obviously, this was information given by appellee in an attempt to explain away the scars on his left thigh (168, 249, 250).

On appellee's return to the superintendent's office, he, and others, were given a lecture on rules and regulations and on the use of care (54, 55, 154), he was told that he would be a student for two weeks and if he qualified he would go on the regular pay list (56, 155). He was told to report back to Master Mechanic Lonergan (56). He did so, and Lonergan sent him to Roundhouse Foreman Farrell and gave him two sheets of paper (56, 155). Apparently one of these is the document Foreman Farrell signed at the end of the first shift on which appellee went around with the fire lighters (see below). It was a printed form (Plf. Ex. 2), and so far as pertinent, provided "please see that ..... student, is thoroughly instructed in the duties of the position named and impress upon him the importance of thoroughly acquainting himself not only with the duties of that position but of any other with which he may be entrusted or to which he may aspire. \* \* \* At conclusion of student trips with you, please fill out and sign the following report and forward it to my office. \* \* \* Opinion as to fitness for position. Learning. A. M. Farrell." (59-61)

Appellee reported to Foreman Farrell on August 10, 1950, for the 3:59 p. m. roundhouse shift (47, 56, 57, 119). These were the instructions which Farrell gave him, and

these were the only instructions received; neither he nor anyone else testified to any other instructions:

“Q. Now, what, if anything, did Tim Farrell tell you when you reported to him?

A. He told me to **keep my eyes and ears open and learn** everything I could about being a fireman.

Q. All right. Did he assign you to anyone to show you what you were supposed to do?

A. Well, he told me to, if I could, **follow these fire lighters**. They were Spanish fellows, and couldn’t—hard to understand their language, but I stayed pretty close to them.

Q. To **follow** the fire lighters?

A. Yes, sir.” (57)

On the first day appellee did nothing but follow the fire lighters. They lit some fires. He lit none. One of them was always with him. (57-59; 155, 156).

The next day, August 11, 1950, appellee returned to the roundhouse at 3:59 p.m. (61, 119) and reported to Farrell but received no further instructions (61). Again he followed the same two fire lighters (61 ff.). **There was always a fire lighter with him** (156). He says that on this day he lit two fires, one on a mallet and one on a switch engine (62, 162).

Just before getting on the locomotive on which the accident happened the fire lighters **“finished lighting all the fires and everything**. The fire lighters told me just to **stand around and watch** and pick up whatever you can learn, can’t help you any more, we have lit all the fires and the engines are ready.” (62) He was standing in a corner just looking around when hostler Peterson came along (63).



Appellee testified that Peterson "was going to move an engine, asked me if I would like to go with him." (63) Peterson, called as appellee's witness, said "I just asked him what he was doing. He told me he was a student fireman, that he was taking his two shifts **in the roundhouse**, going around with the fire lighters, said that it was his second shift. I believe I made the statement that he would be all done after that he could make his road trips, or start his yard trips. \* \* \* I asked him if he was busy right at the time and he wasn't. I said, 'Well I am going to move 2795 out.' More or less he took it for granted and we both got on the engine at about the same time." (188) Peterson did not directly request him to come along (204).

Peterson was not an engineer. He was a fireman who was qualified as an "inside" hostler, i.e., he was qualified to move locomotives on the roundhouse tracks but not outside the roundhouse, on the main line or yard tracks (177; 178 ff.; 199 ff.). He testified: "I have had experience with student firemen, I have had them on the road with me on several engine trips, road trips. **As far as in the roundhouse, why, they are not under my jurisdiction.**" (189)

The only testimony on the question of interstate commerce comes from Peterson. He testified: From Roseville trains go out of the state to Reno and north to Oregon (179 ff.). Mallets are used on trains that go to Reno and are kept in the roundhouse (163, 178, 185). Locomotive 2795, on which the accident happened, was used in road and switching service (156, 179). It had its fire burning and steam up (208) and was assigned to the "Bowman Turn"—a **local** freight service to Colfax and back to Roseville on which it did local work of taking loads and empties to



various places and picking up empties and cars loaded with perishables, to go into various trains (179 ff.; 208). He was going to take it to the sandhouse, on a preparatory track, one of the roundhouse tracks (179, 180, 187, 204, 205). This is all!

Appellee followed Peterson to Locomotive 2795. It was in the roundhouse (64). He got up in the cab and sat on the fireman's seat box. Peterson said nothing as to what he was to do (63, 64, 65). Peterson got in the engineer's seat (65, 189). He just watched Peterson (65). He touched nothing (65, 159, 160).<sup>14</sup> His only purpose was to learn something he had not learned (87). Peterson started to back the locomotive. It moved only a couple of feet. There was a flash-back of fire into the cab, and appellee jumped out the window feet first to the concrete floor some 12 feet below (65, 66, 70 ff.; 160; 190 ff.). He deliberately landed on his right leg in an endeavor to save his injured left leg (73, 160, 161). He fractured the femur of his right leg.

#### **B. Appellee Was Not an Employee of Appellant Within the Meaning of the Federal Employees' Liability Act.**

The facts are clear enough. Appellee was permitted upon the premises of appellant, for a two-week period, to learn something of the job of fireman so that he could pass an examination and qualify. If he qualified, he then would be hired as a fireman. During this two-week period he received no compensation. He belonged to a class popu-

---

14. "Q. You didn't touch a thing? A. No, sir. Q. The only thing that you did until this fire came out of the door was just sit and watch? A. Yes, sir. Q. You didn't attempt to take any part in the handling of the locomotive at all? A. No, sir, I did not. Q. And you didn't intend to, did you? A. No, sir. Q. And nobody had asked you to? A. Nobody asked me; **I figured it was none of my business**, because he was backing the engine out." (159, 160).

larly known as "student fireman." Was he an employee within the meaning of the Federal Employers' Liability Act?

The question is sometimes approached as though there were magic in words. It is approached as though it were a purely legal and logical question whether a student—brakeman, fireman or what not—was an employee, and as though, this question once resolved in one situation, a magic content was given to the word "student" and wherever the word was popularly applied, the same legal result would follow. It will be found, however, on examination of the cases that no such simple "logical" course can be followed.

Usually "students" are not paid. They nevertheless may be employees. The fact that they receive no compensation is not determinative that they are not. This much is conceded. Appellee need cite no cases. But it does not follow from this that all "students" are employees. Further considerations must be looked to. These have been reviewed in *Watkins v. Thompson*, 72 Fed. Supp. 953 (E.D. Mo.—1947) and at this point the discussion in that case, supported by its review of the authorities, is sufficient.

In the *Watkins Case* plaintiff signed a student agreement which required him to serve without compensation to qualify for yard clerk work. The chief yard clerk turned him over to yard clerk Donovan, "with instructions to follow Donovan's orders."<sup>15</sup> The instructions to him also included

---

15. Compare the case at bar. The only directions given to appellee were "to keep my eyes and ears open and learn everything I could about being a fireman. \* \* \* Well, he told me to, if I could, follow these fire lighters." (57). He was not told to follow any instructions which the fire lighters might give him. There is no evidence that they did give him any directions as to what to do. And certainly at no place was he given any directions to do what some irresponsible hostler might tell him to do.

the performance of services. Accordingly, with the yard clerk, he went into the yard and checked the seals on one side of a train while the yard clerk checked the seals on the other side of the train. He actually performed service. What he did relieved the yard clerk of checking the seals on one side of the train. He and the yard clerk then went to a small house to get warm and were going to another train to check the cars in the same way when plaintiff was injured. The Court held that the defendant was not entitled to a judgment notwithstanding the verdict in favor of the plaintiff. The actual holding is no more than that the question was one of fact for the jury. In so holding, it held that:

(1) It was not conclusive that the plaintiff did not receive compensation. It did not hold, however, that this was not a fact which was entitled to consideration.

(2) It held that the "relation is usually dependent upon,

(a) "the right to direct the manner in which the **work** should be done"<sup>16</sup> and

b. Whose **work** it was which was being performed.<sup>16</sup>

The first of the tests suggested—the right of control of the person claimed to be an employee—is not as simple as appears at first blush. One type of control may indicate the master-servant relation. This is the right of control of the detail of activity in furthering the business of the person exercising the right of control. But there is another type of right of control which carries no such implications. This is the right of control exercised by any occupier of

---

16. Notice that both these statements assume that work was being done, i.e., that the "student" was in fact performing services and carrying on the master's business.

premises over persons who are on those premises solely in their own interests—a right of control not of activity in furtherance of the interests of the occupier of the premises, but a right of control solely to the end that there will be no unnecessary collision between persons independently pursuing their own interests, exercised only to the end of essential cooperation. This distinction has been recognized. In *Robinson v. B. & O. R. Co.*, 237 U.S. 34, 59 L.ed. 849, the claim was made that a Pullman porter on a railroad's train was its employee within the meaning of the Federal Employers' Liability Act. The Court held against this. The claim was in part founded upon the proposition that Pullman employees "were bound by the rules and regulations of the railroad company." It also appeared that "the Pullman Company employees to some extent furthered defendant's purposes and cooperated with its own employees." The Court said:

"The service provided by the Pullman Company was, it is true, subject to the exigencies of railroad transportation, and the railroad had the control essential to the performance of its functions as a common carrier. To this end the employees of the Pullman Company were bound by the rules and regulations of the railroad company. This authority of the latter was commensurate with its duty, and existed only that it might perform its paramount obligation."

So in *Hull v. Phila. & R. R. Co.*, 252 U.S. 457, 64 L.ed. 670, the employees of one railroad, while operating its trains on the rails of a second railroad, were subject to the rules and regulations of the second railroad. This did not make them employees of the second railroad, for "so far as they



were subject while upon the tracks of the other company to its rules, regulations, discipline, and orders, this was for the purpose of co-ordinating their movements to the other operations of the owning company, securing the safety of all concerned, and furthering the general object of the agreement between the companies." Compare *Stevenson v. Lake Terminal R. Co.*, 52 F.2d 357 (Circ. 6); *Docheney v. Penn. R. Co.*, 60 F.2d 808 (Circ. 3); *Douglas v. Washington Terminal Co.*, 298 F. 199 (Circ. Dist. Col.); *Gaulden v. So. Pac. Co.*, 78 F. Supp. 651, 656 col. 2 (N.D. Calif.) aff'd 174 F.2d 1022 (Circ. 9) "on the grounds and for the reasons stated" in the opinion below. The same distinction is made in a case cited in the *Watkins Case*, *The F. B. Squire*, 248 F. 469, 471 (Circ. 2), which pointed out that careful distinction must be made "between authoritative direction and control and a mere suggestion as to details or necessary cooperation, where the work furnished is part of a larger undertaking."

The bare conclusion that there is some control is, then, colorless. Something more is necessary. It is necessary to find the character of control and the purpose for which it is exercised.

The second consideration noticed in the *Watkins Case* is that the asserted employee was doing some work—was performing some service—for the master. It will throw light on this to consider the actual facts of the cases relied upon in the *Watkins Case*, and the *Watkins Case* itself. It will be noticed in the *Watkins Case* that what the student was doing relieved the yard clerk of some work. In *Huntzacker v. Ill. C. R. Co.*, 129 F. 548, 549 (Circ. 6) the student "par-



ticipated in the performance of the duties of flagman.”<sup>17</sup> In *McMillan v. Grand Trunk R. Co.*, 130 F. 827 (Circ. 1), deceased was killed while actually attempting to make a coupling.<sup>18</sup> In *Brown v. Chicago etc. R. Co.*, 315 Mo. 409, 286 S.W. 45, it appeared that the service was “to fire the engine,” for deceased “ran the stoker, shoveled coal, and helped shake the grates and clean the cinders out of the pan.”<sup>19</sup> In *Millsaps v. Louisville etc. Ry. Co.*, 69 Miss. 423,

---

17. A student brakeman was killed in a rear-end collision. For some time he had been working on trains and “participated in the performance of the duties of flagman.” On this particular train he continued “his practice of executing a flagman’s duties.” His agreement contemplated this, for in consideration of being permitted on the train, he “was to perform such elementary and simple service as he was capable of” and it was said while availing himself of the privilege “he was under a duty to perform the service expected of him.” [Compare the very different agreement in the case at bar (see p. 16 above and part C below).] “He was enjoying the privilege and rendering the service at the time when he lost his life.” The Court added: “We have no doubt of the correctness of the proposition contended for by counsel for the plaintiff that one who, **for his own purposes**, and by consent of another, assists that other in facilitating the discharge of a duty owed to himself, cannot be regarded as a servant of the other.”

18. The facts are not stated with particularity. All that appears was that plaintiff “was set to work coupling freight cars, and was fatally injured while coupling them.” The point with which we are concerned was not really raised. This the Court noticed. “It is not questioned that the deceased stood as a servant.”

19. The Court, attempting to advance the conclusion it reaches, indulges in the dubious practice of assuming what the result would be in a different situation by suggesting that if the student fireman were negligent and a third person were injured, the railroad would be liable. This sort of argument does no more than assume the answer to the question. The propriety of this sort of argument is made highly questionable because the railroad might very well be liable to a third person, but on principles distinct from those of *respondeat superior*—upon the ground that it itself was negligent because proper functioning of a fireman is a non-delegable duty in the operation of a railroad. See *Robinson v. B. & O. R. Co.*, 237 U.S. 84, 59 L.ed. 849; *Magruder v. Yellow Cab Co.*, 141 F.2d 324 (Circ. 4); *Bowman v. Pace Co.*, 119 F.2d 858 (Circ. 5).

13 So. 696, again, the "student" was "working as fireman on a locomotive."<sup>20</sup> In *Weisser v. So. Pac. Ry. Co.*, 148 Cal. 426, 430, 83 P. 439, the "student" was actually doing the work of a brakeman on a train.<sup>21</sup> The same was true in *Atchison etc. Co. v. Fronk*, 74 Kan. 519, 87 P. 698.<sup>22</sup> *Findlay v. Coal & Coke Ry. Co.*, 76 W.Va. 747, 87 S.E. 198, involved not only service but actual payment of compensation, and calls for no comment.<sup>23</sup> In *Rief v. Great Northern*

---

20. This case is of little help. A demurrer to the complaint was sustained upon the ground that the injury resulted from the act of a fellow servant. The complaint alleged that Millsaps was killed "while working on one of defendant's engines, acting as fireman." The fact so alleged was admitted for purposes of demurrer.

21. Here the injured man "was required to perform such ordinary duties of brakeman as were allotted to him." He was "regularly engaged in the doing of the defendant's business" and "was engaged in the service of the defendant."

22. Here the Court received in evidence the form of agreement under which the student brakeman was on the defendant's premises. It was the same general type of thing that the Court in the case at bar excluded when it excluded Defendant's Exhibit A for identification. It differed materially, however, in its terms, and by its terms clearly contemplated that the student should perform service. It recited that he had "requested the privilege of **working** on and about the locomotives, trains and cars of said railway company"; that the railroad should be relieved of liability for injuries sustained by him "while so **working**" and that he assumed all danger "of such **work**" and of injuries received "in or about such **work**" and that he was not to receive compensation "for any **work** that I may do during such time." Moreover, this is another case which came up on the pleadings. The complaint alleged that "he was in the service of the defendant," an answer was filed and the case came up on a ruling on demurrer to the answer. The Court stated that "the conclusion is irresistible that Tindell was in the service of the railway company" and it said "the services **which the agreement contemplated** that Tindell would perform for the company are sufficient to justify the conclusion that while performing such services he was an employee of the company" and that it appeared he "was working for the company, assisting in the operation of the train."

23. In this case the defendant, for reasons peculiar to certain defenses urged, "proved that the plaintiff's decedent was, at the time of his death, employed in the operation of the train." It further appears that he was paid. The Court said: "His employment, **his place on the payroll** of the company, implies service."

*Ry. Co.*, 126 Minn. 403, 148 N.W. 309, it again appeared beyond dispute that the "student brakeman" was expected to and did actually perform services of a brakeman.<sup>24</sup> The last case is *Chesapeake & O. R. Co. v. Harmon's Adm'r*, 173 Ky. 1, 189 S.W. 1136. If anything, it is an authority against appellee, and is more appropriately dealt with at page 51 ff. below.

The facts of all of these cases differ radically from those of the case at bar. It may be that at some stage appellee, before he was qualified and was hired, would perform some service and would attain the status of an "employee." But he had not yet done so. It is beyond dispute that so far as his instructions from the foreman are concerned he was not instructed to perform any service. His only instructions were to keep his "eyes and ears open and learn everything I could about being a fireman" and to "follow these fire lighters." (p. 34 above). There is no evidence that any fire lighter gave him any direction or instruction to perform service. It is clear that he did not displace a fire lighter or confer any benefit on appellant by relieving any fire lighter of the performance of service. There was

---

24. It clearly appeared that plaintiff was performing service, for he was injured "in attempting to descend from a box car to throw a switch." Again there was an agreement, and the Court points its significance by saying that "although there is nothing in the contract itself indicating that plaintiff as a student brakeman was to render any service whatever for defendant, the testimony conclusively shows that he was **expected to perform, and did perform**, such tasks as were assigned him." [There is no such testimony in the case at bar.] "He helped load and unload freight at way stations, threw switches, and did whatever he was ordered to do in the operation of the train." The implication is clear from this that if nothing more appeared than the agreement, he would not have been treated as an employee. The case is inconsistent with the holding that the agreement entered into is so far immaterial that it is to be excluded from evidence.



always a fire lighter with him (p. 34 above). He said that he lit two fires. The circumstances do not appear. He was not told to light any fires. So far as appears he did this wholly as a volunteer, and as a matter of experiment for his own benefit. It certainly does not appear that he did this in performing a service for appellant.

### C. The Court Erred in Excluding Evidence on the Issue of Employment.

Assuming that we are wrong and that the question of employment presented an issue for the jury it still remains that the question should have been submitted to them in a proper frame of reference and with all of the facts disclosed.

To give the question its proper frame of reference appellant offered to show that there were 3 stations on the path to permanent employment as a fireman, student fireman, provisional fireman and permanent employee. It sought to do this by introducing a portion of the Firemen's Agreement (see p. 20 ff. above). This was excluded. To be sure, appellee was not a party to this agreement—he was not a fireman. But the agreement did show **as matter of fact** the system set up. The fact that there was a grade of relationship, in which service was performed, between student and regular employee served to place the status of student in its proper setting.

But far more important were the precise terms of the agreement under which appellee was on appellant's premises (see this set out p. 16 above). He agreed to "the understanding that I shall be under **no obligation to perform any work or service** upon said railroad until employed

by said company." Nowhere in the evidence is there anything to contradict this. It is not material that this is contained in a mere "Whereas" clause or as a recitation. It is evidence of a material fact and it was for this that it was offered.

So far as we are aware this is the only case in which such an agreement has been rejected. The agreement under which the student was on the railroad premises was received in the *Huntzacker Case* (see note 17 above), in the *Fronk Case* (see note 22 above), and in the *Rief Case* (see note 24 above). That in those cases the agreement tended to show that the student was an employee and in this case tends to show that he was not and that he was not to perform any work or service is certainly not ground for excluding it.

Appellee in this case was permitted to testify to part of the story of his relationship to appellant. Appellant was entitled to have the whole story shown—to have all the facts before the jury. In *Warrior-Pratt Coal Co. v. Shereda*, 183 Ala. 118, 62 So. 721, the question was whether plaintiff was an employee of defendant or an independent contractor. Defendant called a witness to show the nature and the character of the contract. The evidence was excluded. This was held error. "The Court also erred in restricting the defendant in its efforts to show the full contract or agreement between plaintiff and defendant. If they engaged to the 'usual' effect 'for driving rooms' in that mine, the terms that engagement comprehended were proper matters for the jury's consideration." *Cooney v. Glide*, 97 Cal. App. 77, held that a proposal, which never ripened into a contract, was admissible to show some of the



terms of the oral agreement which was finally reached—the materials to be used and how they were to be applied. It was one of the facts of the dealings of the parties although itself not an agreement. So an agreement which is illegal may be used to show the intention of the parties where there is no attempt to enforce it, i.e., it is admissible as a factual circumstance (6 *Williston Contracts*, rev. ed. § 1710, note 10). The rule is simple and elementary:

“Any competent evidence, including the acts and declarations of the parties, the history of the transaction, and all the surrounding facts and circumstances, is admissible to prove the existence **and terms** of the contract.”

17 C.J.S. 1238, *Contracts*, § 593.

“The second axiom on which our law of Evidence rests is this: *All facts having rational probative value are admissible, unless some specific rule forbids.*”

1 *Wigmore, Evidence*, 3 ed. § 10.

For a more particular discussion of what may be looked to to find the terms of an agreement see *Wigmore, Evidence*, 3 ed. §§ 377, 2099, 2105, 2115; *Memphis Mining Co. v. Shackett*, 153 Ky. 476, 155 S.W. 1154, 1155<sup>25</sup>; *Van Drake v. Thomas*, ..... Ind. .... 38 N.E.2d 878, 882, 883<sup>26</sup>; *Gulf etc. R.*

---

25. The question was whether the relation of master and servant existed. The court said, quoting 26 Cyc. 971: “Whether or not the relation of master and servant exists in a given case is a question of fact, or of mixed law and fact, and is to be proved as any other like question. Generally speaking, any evidence tending to prove or disprove the relationship is admissible; its weight and sufficiency being left to the jury under the instructions of the court.”

26. The question was of the relationship of master and servant. It was held not error to admit in evidence an automobile insurance policy containing an employer’s non-ownership endorsement

*Co. v. Graham*, 153 Miss. 72, 177 So. 881<sup>27</sup>; *Wright v. Elk etc. Co.*, 129 Mich. 543, 89 N.W. 335; *Conrad v. Elksen Harvey Co.*, 120 Va. 458, 91 S.E. 763.<sup>28</sup>

The matter is fairly easily tested. Had the statement in the writing been that appellee was under a duty to perform such work and service as was directed there certainly would have been no objection and the court would have admitted it. The document is not less relevant and material because its terms are to the contrary and tend to disprove the position appellee takes.

**D. Appellee Was Not Engaged in Interstate Commerce Within the Meaning of the Act.**

It is beyond question that appellee would not have been held to have been engaged in interstate commerce so as to make the Federal Employers' Liability Act applicable as the Act read prior to 1939. Under the Act as it read before the 1939 Amendment the employee had the burden of proving that at the very moment he was injured he was engaged in interstate transportation or work so closely related thereto as to be practically a part of it (see note 5, p. 6 above). A roundhouse employee (assuming, for the mo-

---

and showing the name of an employee. The court said: "The difference between an independent contractor and a mere servant is to be determined from the agreement as a whole. \* \* \* Since the contract of employment between these parties was oral the question of whether a master-servant relationship existed was properly submitted to the jury and Exhibit 12 was admissible on this issue." Exhibit 12 was the insurance policy.

27. Again there was an issue of the relationship of the parties and whether the master-servant relationship existed. The court said: "Any competent and relevant evidence tending to prove or disprove the relationship in question was admissible."

28. The last two cases admitted expired contracts as evidence of the current relationship.

ment, employment) servicing an unidentified locomotive in the roundhouse—by consequence a locomotive not proved to have been assigned to interstate work—did not meet the requirements. (*Walton v. So. Pac. Co.*, 8 C.A.2d 290, 299-302, 48 P.2d 108;<sup>29</sup> *Shanks v. Delaware etc. R. Co.*, 239 U.S. 556, 60 L. ed. 436; *Chicago etc. Ry. Co. v. Bolle*, 284 U.S. 74, 76 L. ed. 173; *Chicago etc. R. Co. v. Ind. Com'n*, 284 U.S. 296, 76 L. ed. 304; *New York etc. R. Co. v. Bezue*, 284 U.S. 415, 76 L. Ed. 370; *Ind. Acc. Com'n of Calif. v. Davis*, 259 U.S. 182, 66 L. ed. 889.)

If the Act applies it must be by reason of the addition of a paragraph to § 1 in 1939 (45 U.S.C. § 51). This addition extended the coverage of the Act to two classes of employees, (1) those **“any part of whose duties as such employees shall be in furtherance of interstate or foreign commerce”** and (2) those whose duties **“shall, in any way directly or closely and substantially, affect such commerce”**.

Remembering that the first paragraph of §1 was in no way changed by the 1939 Amendment, and that the Amendment was only by the addition of a paragraph, it is apparent that “interstate commerce” in the added paragraph has the meaning fixed by the decisions under the Act before the Amendment. The enlargement of the coverage was by the words we have put in bold face.

---

29. The court held that the deceased was not engaged in interstate commerce when he was servicing a switch engine used to handle, indiscriminately, interstate and intrastate cars. Recovery was permitted even though it was held the Federal Employers' Liability Act did not apply because, so it was thought, recovery could be had if the Boiler Inspection Act alone applied. The case has been overruled for this last holding but the holding that the deceased was not engaged in interstate commerce was not disturbed. *Scott v. I. A. C.*, 9 C.2d 315, 320, 70 P.2d 940.

In *Ind. Acc. Com'n. v. Davis*, above, the court had this to say:

"The federal act gives redress only for injuries received in interstate commerce. But how determine the commerce? Commerce is movement, and the work and general repair shops of a railroad, and those employed in them, are accessories to that movement—indeed, are necessary to it; but so are all attached to the railroad company—officials, clerical, or mechanical. Against such a broad generalization of relation we, however, may instantly pronounce, and successively against lesser ones, until we come to the relation of the employment **to the actual operation of the instrumentalities for a distinction between commerce and no commerce.** In other words, we are brought to a consideration of degrees, and the test declared, that the employee, at the time of the injury, must be engaged in **interstate transportation or in work so closely related to it as to be practically a part of it**, in order to displace state jurisdiction and make applicable the federal act."

The Act is then to be construed and applied, as to the 1939 Amendment, as though it provided that its coverage was of:

- (1) Employees any part of whose duties as such shall be the furtherance of interstate transportation or work so closely related to it as to be practically a part of it; and
- (2) Employees whose duties shall, in any way directly or closely and substantially, affect interstate transportation or work so closely related to it as to be practically a part of it.

The first part of the Amendment had a definite purpose. It was designed to cover those employees who at one time would be handling interstate cars and at another time, doing substantially the same type of work, would be



handling only intrastate cars. It was designed to make the application of the Act uniform as to them and not have them passing in and out of the Act as, unknown to them, the character of the cars they were dealing with changed from time to time. For example, a switchman would sometimes switch interstate cars and then again only intrastate cars. Or a road crew running 100 miles might for part of the run have interstate cars in the train and then these might be removed and for the rest of the run they would handle only intrastate cars. With this part of the Act we are not concerned. Whatever appellee was doing was the same throughout the only two shifts he was on the premises of appellant. If the Act applied to him at all it was because of the second provision of the Amendment—because he had duties which “directly or closely and substantially” affected interstate transportation or work so closely related to it as to be practically a part of it. This could be said of a student brakeman not merely observing, but actually working and performing service, on an interstate train or upon a train which, part of the time, had interstate cars or interstate shipments. But can it be said of plaintiff?

It certainly cannot be said that anything plaintiff did “in any way **directly**” affected interstate **transportation**—the actual movement of interstate cars or shipments—or work so closely related to such transportation as to be practically a part of it. Learning how to build a fire in a locomotive, or building a fire in an unidentified locomotive, by one whose employment and actual service upon a locomotive is wholly contingent and speculative certainly does not “directly” affect **interstate transportation**. Nor does it “closely and substantially” affect **interstate transportation**. (Cf. *Chic. etc. R. Co. v. Harrington*, 241 U.S. 177, 180, 60 L. ed.



941, 942.) This would be true even if it could be shown, or were shown, that appellee in what he did had some contact with locomotives used for interstate transportation. But not even this is shown. Cf. *Hallaway v. Thompson*, 148 Tex. 471, 226 S.W.2d 816 esp. on reh. 823 ff.; *Shoenfelt v. Penn R. Co.*, 69 F. Supp. 728 (S.D., N.Y.).

The only showing was that some trains operating in and out of the Roseville Yards were interstate trains and that some of the locomotives based at the Roseville roundhouse were used on such trains.<sup>30</sup> But the locomotives with which appellee had contact are wholly unidentified. Nothing is shown except that one was aallet, one was a switch engine, and the 2795 was assigned to a local train. It is not shown that any engine was ever used to haul an interstate car. Indeed except as to the local engine, 2795, it is not even shown that the other engines were in service. For all that appears they had been taken out of service and were undergoing heavy repairs.

**E. If Appellee Was an "Employee" He Departed from the Course of His Employment. In Any Event the Court Was Guilty of Prejudicial Error Touching the Issue.**

We now assume a technical "employee" status. It remains to consider with more particularity what it was. If appellee had such a status it was status as an employee to follow the fire lighters. His instructions from the foreman were precise (see p. 34 above). He received no instructions to go on any locomotive while it was being moved. The work of the fire lighters on the second shift was completed (see p. 34 above). Then along came Peterson. He was a mere interloper. According to his testimony—the only testimony

---

30. The only evidence is that given by hostler Peterson, p. 35 above.

on the point—he had no jurisdiction of students in the roundhouse (see p. 35 above). His own statement would have been fortified had the court not improperly excluded Rule 864 when offered by appellant (see p. 11 ff. above). And then the court, improperly refusing to rule as matter of law that appellee had stepped aside from the course of his employment, ruled as matter of law that he had not and refused to submit this issue to the jury (Assignment of Error 4, p. 9 ff. above).

There is no doubt of the general rule that one who was an employee and who was injured but while deviating from the course and scope of his employment, cannot claim to be an employee at that time and so entitled to the benefit of statutes providing remedies for employees.

*Mostyn v. Del. L. & W. R. Co.*, 160 F.2d 15 (Circ. 2

—cert. den. 332 U.S. 770, 92 L.ed. 355);<sup>31</sup>

*Smith v. So. Pac. Co.*, 51 Nev. 390, 277 P. 609;<sup>32</sup>

---

31. The employer provided a bunk car as sleeping quarters for employees. The employee took his bedding outside the car and slept on the right of way. Held, that the employee would have been an employee within the meaning of the Act, in the circumstances of this case, had he been sleeping in the bunk car but that in sleeping outside he deviated from the course of his employment. The court followed an earlier case for the rule “that any activity undertaken by an employee for a private purpose is certainly not within his employment.”

32. A member of one train crew, at the request of a telegrapher, was attempting to give train orders to the engineer of a passing train. He was injured in the attempt. It was the duty of the telegrapher himself to hand the train orders to the engineer. It was held that the train crew member was not an employee within the Federal Employers' Liability Act for his act “was a volunteer service, an act of friendship for Lusk [the telegrapher], and not an act in the course of his employment, for which the defendant is liable. \* \* \* He then became a volunteer and his own negligence was the sole cause of the injury.” The situation was not changed because the telegrapher had requested him to do this. The telegrapher had no authority to assign duties to him.

- Louisville & N. R. Co. v. Pettis*, 206 Ala. 96, 89 So. 201, 204;<sup>33</sup>  
*C. & O. Ry. Co. v. Harmons Adm'r*, 173 Ky. 1, 189 S.W. 1136.<sup>34</sup>

Compare:

- Lavender v. Ill. C. R. Co.*, 358 Mo. 1160, 219 S.W.2d 353, cert. den. 338 U.S. 822, 94 L.ed. 499 and 338 U.S. 881, 94 L.ed. 541;  
*Dalsheim v. Ind. Acc. Com'n*, 215 Cal. 107, 8 P.2d 840;  
*Calif. C. I. Exch. v. Ind. Acc. Com'n*, 190 Cal. 433, 213 P. 257;  
*Highway Com'n v. Ind. Acc. Com'n*, 61 Cal. App. 284, 287, 214 P. 658;  
*Peccolo v. Los Angeles*, 8 C.2d 532, 535, 66 P.2d 651;  
*Gordoy v. Flaherty*, 9 C.2d 716, 72 P.2d 538.

The rule is peculiarly applicable to one who is acting in violation of rules, orders or instructions (*Bourne v. So. Ry. Co.*, 225 N.C. 43, 33 S.E.2d 239; *Nat. Auto. Ins. Co.*

---

33. "If the particular service plaintiff was performing (when injury befell him) was outside the scope of his employment, or was not directed or enjoined upon him by a representative or representatives of the defendant authorized to control plaintiff's service, or this particular service was not knowingly acquiesced in by a representative who had authority to control the plaintiff's service in that regard, the plaintiff's relation to that corporation would be referable to his voluntary act, and the defendant would not be responsible for his injury." The case was one under the Federal Employers' Liability Act and a state liability act.

34. A student fireman left the locomotive of the train, went into the caboose and went to sleep. He did this in defiance of requests that he go upon the locomotive. He was killed in a rear end collision. Held, that he had deviated from the course of his employment.

*v. Ind. Acc. Com'n*, 8 C.2d 715, 68 P.2d 361<sup>35</sup> and cases there cited; *Ind. Indem. Exch. v. Ind. Acc. Com'n*, 86 C.A.2d 202, 194 P.2d 552). In going on locomotive 2795 appellee clearly violated his instructions, which were to follow the fire lighters. His instructions were to observe the lighting of fires on standing locomotives. He was given no instructions to go on any locomotives when they were moved. Further, had Rule 864 been admitted in evidence it would have been clear that he was in violation of that Rule expressly providing that "persons must not be permitted to ride on an engine \* \* \* without a written order from the proper authority, except employees in the discharge of their duties." (See p. 12 above).

The facts of this case point the reason and significance to the Rule. The firebox door opened toward the fireman's side of the cab. It was propped open with a sand scoop. Appellee proved abundantly that this was in clear violation of rules designed to prevent accidents just such as this (196 ff.). The rules state clearly and without ambiguity that the fire door must be kept securely latched. Any experienced man who got in the cab of the locomotive would have seen in an instant that the rule was being violated and would have realized the significance of the violation. Appellee noticed that the fire door was open as soon as he got in the cab (70, 71, 157). He sought to excuse his own failure to

---

35. This case and the cases cited are of interest because in them there are instructions that the employee was not to go about his work until the happening of a specified event. His conduct before the happening of that event was outside the scope of his employment. The cases are of interest because the converse of the case at bar. Appellee was injured after all of the matters to which he had been directed—the lighting of fires on locomotives—had been completed. The fire lighters had told him that all the fires were lit and there was nothing more to do.



take steps against the risk presented by his own ignorance and want of appreciation of the danger. "I noticed it was open, but I didn't pay any attention to it, because I figured it was supposed to be that way. Q. Did anyone ever tell you that the door was not supposed to be open? A. No, sir. Q. No one gave you any instructions one way or the other on that? A. No, sir." (71) This is just the reason why unauthorized persons are forbidden to go on locomotives.

Libbey's conduct was not less a deviation from his "employment" and a violation of instructions and the rules because he was asked to go upon the locomotive by hostler Peterson. This is the second significant aspect of Rule 864. Taken together with Peterson's own testimony that as an inside hostler he had no jurisdiction over student firemen it makes it clear that he had no authority to ask appellee to go upon the locomotive or authorize him to go upon it—that this was not an act of appellant (cf. *Smith v. So. Pac. Co.*, note 32 above and see note 33 above).

Nor was appellee's conduct any less a deviation from his "employment" because he was endeavoring, if he was endeavoring, to learn something which would qualify him for employment as a fireman. Conduct beyond the scope of assigned duties is no less a deviation from the employment, because the employee is endeavoring to learn something which will make him more valuable to his employer (*Young v. Dept. of L. & I.*, 200 Wash. 138, 93 P.2d 337).

In connection with this whole matter *Bourne v. So. Ry. Co.*, 225 N.C. 43, 33 S.E.2d 239, cited above, is most instructive. In this case a qualified locomotive engineer was riding over a section of the line of the railroad to acquaint himself with it and to qualify himself to operate over it. In



violation of rules he took the place of the regular engineer and was operating the locomotive. It was held that he was not an employee within the meaning of the Federal Employers' Liability Act and that the Act did not apply.

**F. The Court Erred in Excluding Evidence on the Issue of Fraud in Procuring Permission to Go on Appellant's Premises.**

The rule is settled that one who procures his employment by fraud is not entitled to the benefits of the Federal Employers' Liability Act (*Minn. etc. R. Co. v. Rock*, 279 U.S. 410, 73 L. ed. 766). The only qualification is that the fraud must be of such character as to have some causal relation to the claim under the Act (*Minn. etc. R. Co. v. Borum*, 286 U.S. 447, 76 L. ed. 1218). Most of the cases sustaining a finding that there was no such fraud are cases in which there was misrepresentation as to age and in which the employee by a very considerable period of active service had demonstrated that without regard for his age he could do his job. Upon the other hand the rule of the *Rock Case* has peculiar application to cases like the *Rock Case* where the misrepresentation was of physical condition and physical capacity to work. The rule of the *Rock Case* was applied in the following cases:

*Norfolk & W. R. Co. v. Bondurant*, 107 Va. 515, 59 S.E. 1091 (student fireman—misrepresentation as to age);

*Stafford v. B. & O. R. Co.*, 262 Fed. 807 (N. D. W. Va.—misrepresentation as to physical condition);  
*Ft. Worth etc. Ry. Co. v. Griffith* (Tex. Civ. App.), 27 S.W.2d 351 (misrepresentation as to physical condition);

*Clark v. Union P. R. Co.*, ..... Ida. ...., 211 P.2d 402 (misrepresentation as to physical condition).

Appellee misrepresented his physical condition to Dr. Cress, appellant's examining physician charged with the duty of passing upon applicants for employment for physical fitness (see p. 31 ff. above). Part of the showing required of appellant was to show that the misrepresentations were material and that had the truth been known appellee would not have been passed. To this end it was necessary for it to show that had Dr. Cress known the truth he would not have passed appellee. It was necessary for appellant to show that appellee's physical condition, as a result of earlier injuries, was such that he did not measure up to the standards of physical fitness required for employment as a fireman. When appellant undertook to prove these matters its evidence was excluded (see p. 23 ff. above). This was error. It was entirely proper for appellant to show both (1) that its examining physician would not have passed appellee had he known the truth and to prove this by the testimony of the examining physician himself and (2) to show from this examining physician what appellant's standards were and that appellee did not meet them.

Against such objections as were urged—that the question called for the conclusion of the witness and invaded the province of the jury—courts have repeatedly held that such testimony is admissible. In *Bernstein v. Gross*, 58 F. 2d 154, 155 (Circ. 5) the charge was fraud. The victim testified that he relied on the representation and it was held that his testimony that he "would not otherwise have parted with his money, is admissible evidence of a fact best known to himself." *Metropolitan L. Ins. Co. v. Becraft*, 213 Ind. 378, 12 N.E.2d 952 was an action on an insurance policy. The defense was fraudulent misrepresentations as to physical condition and prior treatment by a physician. The em-

ployee of the insurance company whose duty it was to pass on applications was asked whether, if he had known the truth, he would have approved the application. It was held that "the question was competent. A party may testify that he would not have entered into a transaction if he had known the truth, just as he may testify as to his motive or intention." *Lawrence v. Conn. M. L. Ins. Co.*, 91 F.2d 381, 384 (Circ. 6) was a similar case. It was said that an objection to the testimony of defendant's assistant medical director that had he known the true facts as to the applicant's physical condition, he would not have accepted the policy was "utterly lacking in merit." *Gilbert v. Inter-Ocean Casualty Co.*, 41 N.M. 463, 71 P.2d held that it was reversible error to reject evidence that the officer who passed on an application would not have approved it had he known of the existence of three other policies since "the burden rested on appellant to show that the statement was material." Accord: *New York L. Ins. Co. v. Tuhlenschmidt*, ..... Ind. ...., 31 N.E.2d 1000; *Thompson v. New York L. Ins. Co.*, 143 Fla. 534, 197 So. 111; *International Trust Co. v. Myers*, 241 Mass. 509, 135 N.E. 697, 699; *Breshears v. Callender*, 23 Ida. 348, 131 P.15, 19.<sup>36</sup>

Even if there were doubt—and there is not—the evidence should have been admitted for "in any case, the statute or rule which favors the reception of the evidence governs" (Fed. Rules Civ. Proc., Rule 43 (a)).

---

36. "By the weight of authority, testimony of plaintiff that he would not have entered into the transaction had he known the truth or had not the representations been made is competent as being the statement of a fact peculiarly within the knowledge of the witness and hardly susceptible of proof in any other way, and this notwithstanding the objection that the testimony is a mere conclusion."

The first question, what the doctor would have done had he known the truth, was proper. The second question was even more proper. It asked for a standard and called upon a qualified expert to express an opinion as to whether stated facts met a known standard. This is the classical function of expert testimony. (Cf. *Sheehan v. Board of Police Com'rs*, 197 Cal. 70, 77, 234 P.844; *United States v. Francis*, 64 F.2d 865 (Circ. 9).)

#### **G. The Verdict Is Excessive.**

In a case which, on its facts, is proper for the exercise of the power, this Court has power to give relief if an award of damages is excessive as matter of law or is the result of passion and prejudice. (*Cobb v. Lepisto*, 6 F.2d 128, 129 (Circ. 9); *Dept. of Water and Power v. Anderson*, 95 F.2d 577, 586 (Circ. 9); *So. Pac. Co. v. Guthrie*, 186 F. 2d 926 (Circ. 9); *Covey-Gas Oil Co. v. Checketts*, 187 F. 2d 561 (Circ. 9).)

This case is a puzzling one because of the condition of appellee's left leg resulting from his wound in 1943. Strangely enough the injury to the left leg and the injury to the right leg were substantially the same and had substantially the same effects. Both resulted in a fracture of the femur at approximately the junction of the lower and middle third. Both fractures healed with a bowing. In the right leg a shortening resulted. Both produced limitation of motion in the knee and some slight restriction of motion in the hip and ankle. At the time of trial appellee was still experiencing some incapacity as the result of the injury to the right leg. He tired readily, had some difficulty in walking, particularly going up and down stairs, and tired



in standing (97 ff.; 125 ff.). The injury was of a type that calls for a considerable period of recuperation. But, that with time, improvement will come could not be better demonstrated than in his own case of injury to the left leg. Injured in 1943 he was still using crutches when he was discharged from the Marines in 1945 (see p. 29 above) and yet, thereafter, there was continued and steady improvement.

It will not do to speak simply of his disability or incapacity for work. The condition of the left leg is a contributing factor. For this appellant is in no sense responsible. Yet, beyond doubt, the jury took this into consideration. It looked at the whole man and made an award to compensate for his present condition, part of which was not attributable to the injury of 1950. Nothing could demonstrate better than this award the very real importance to appellant of knowing the truth as to his physical condition before it permitted him to go upon a locomotive.

We could search the books and produce for the Court cases of awards where the injuries were parallel. Collections of cases are readily available. (See 25 C.J.S. 914 ff., particularly 954 ff.; 46 A.L.R. 1230 ff., particularly 1353 ff.; 102 A.L.R. 1125 ff., particularly 1405 ff.). It is difficult to say that examination of the cases is likely to be of great assistance here. The simple fact is that if proper compensation for the injury to the right leg is \$50,000 proper compensation for injury to the other leg would be substantially the same. It is submitted that the total incapacity of the man is not such as would warrant compensation of \$100,000.

Appellee is a young man. He has had no special training in any given line of endeavor which is now lost to him.



There is no injury to his upper extremities. He is susceptible of training and rehabilitation. There is no evidence which would indicate that he is an economic derelict. He can have a full and useful life. He has available to him the facilities of both federal and state services designed to fit him for a useful life.

It is submitted that the verdict represents not compensation but penalization.

### **CONCLUSION**

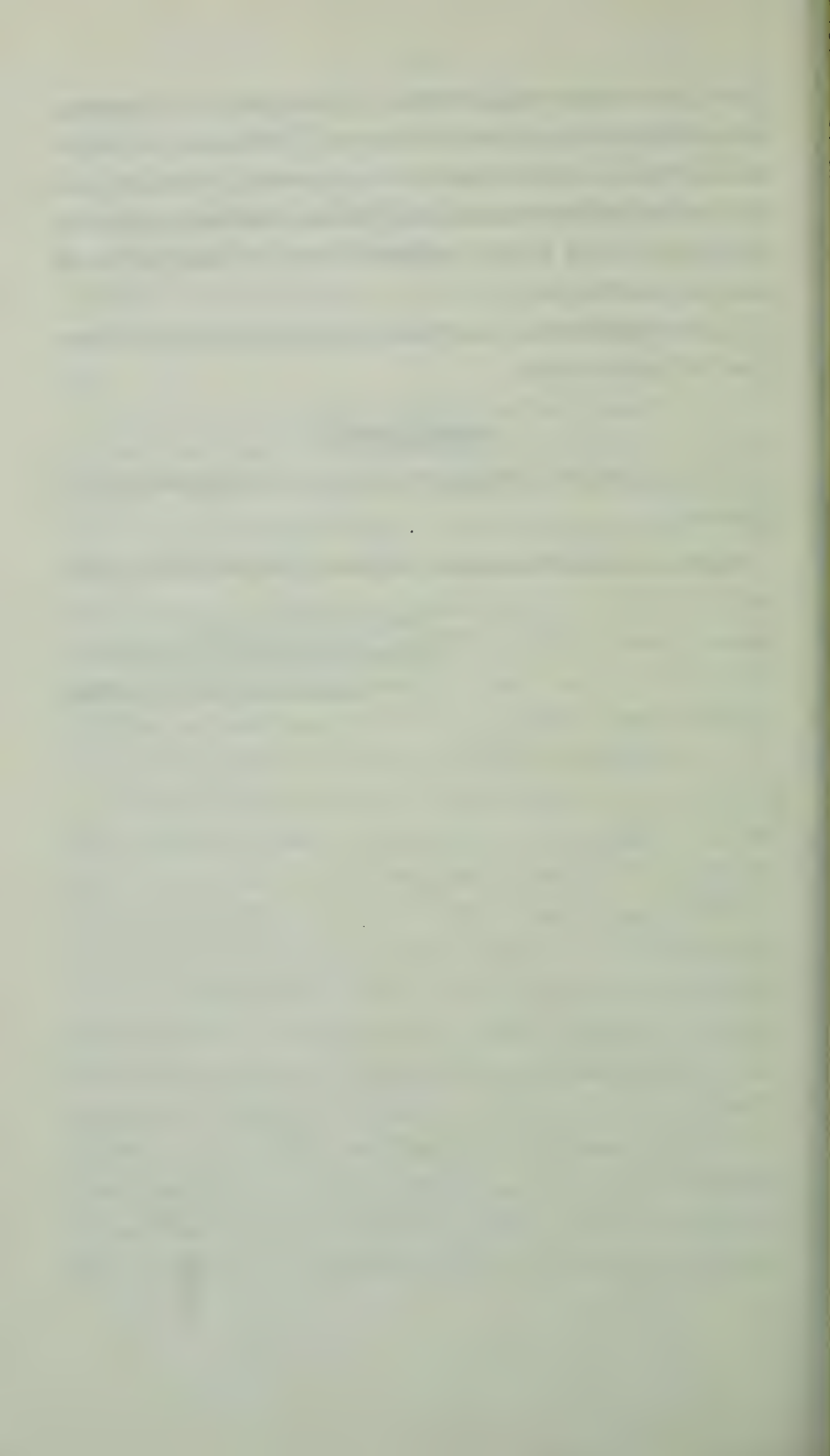
It is respectfully submitted that the judgment must be reversed.

Dated at San Francisco, California, November 14, 1951.

ARTHUR B. DUNNE

DUNNE, DUNNE & PHELPS

*Attorneys for Appellant.*



No. 13,078

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

---

SOUTHERN PACIFIC COMPANY,  
a corporation,

*Appellant,*

vs.

ROGER N. LIBBEY,

*Appellee.*

**On Appeal from the United States District Court for the  
Northern District of California, Southern Division.**

**BRIEF FOR APPELLEE.**

---

DANIEL V. RYAN,

THOMAS C. RYAN,

RYAN & RYAN,

800 Phelan Building, San Francisco 2, California,

*Attorneys for Appellee.*

**FILED**

**DEC 14 1951**



## Subject Index

---

	Page
I. Statement of the case .....	1
II. Argument .....	4
A. Appellee was an employee under the Federal Employers' Liability Act .....	5
B. Appellee was engaging in the furtherance of interstate commerce .....	10
C. Appellee was in the scope of his employment when on the engine at the time of his injury and did not deviate from his duty .....	15
D. The court properly excluded the void contract and immaterial rules .....	22
E. The verdict is not excessive .....	27



## Table of Authorities Cited

Cases	Pages
Affolder v. N. Y., Chi., & St. L. Ry. Co., 339 U.S. 96, 94 L. Ed. 683 .....	28
Atchison, T. & S. F. R. Co. v. Frouk (Kan. 1906) 87 P. 698	9
Blanton v. Northern Pac. Ry. Co. (Minn.) 10 N.W. (2d) 382	27
Brown v. Chicago R. I. & P. R. Co. (Mo. 1926) 286 S.W. 45, 49 .....	8, 22
Chesapeake & O. Ry. Co. v. Harmon's Adm'r (Ky. 1916) 189 S.W. 1136 .....	8, 20, 21
Chicago, R. I. & P. R. Co. v. Bond, 240 U.S. 449, 60 L. Ed. 735 .....	5
Duncan v. Thompson, 315 U.S. 1, 86 L. Ed. 575 .....	24
Edwards v. Baltimore & Ohio R. Co. (7 Cir.) 131 F. (2d) 366 .....	12
Findley v. Coal & Coke Ry. Co. (W. Va.) 87 S.E. 198 ....	9
Haluptzak v. Railway Co. (Minn.) 57 N.W. 145 .....	9
Hart v. New York C. & H. R. R. Co. (N.Y.) 98 N.E. 493	27
Hull v. Philadelphia & R. R. Co., 252 U.S. 475, 64 L. Ed. 670 .....	5
Huntzicher v. Ill. Central (6 Cir. 1904) 129 F. 548 ....	7, 21, 22
Kach v. Monessen Southwestern Ry. Co. (3 Cir.) 151 F. (2d) 400 .....	12
Kenny v. Union Railway Co. of N. Y., 152 N.Y.S. 117.....	27
Linstead v. Chesapeake & Ohio R. Co., 276 U.S. 28, 72 L. Ed. 453 .....	5
McMillan v. Grand Trunk R. Co. (1 Cir. 1904) 130 F. 827	7
Millsaps v. Louisville N. O. & T. Ry. Co. (Miss. 1891) 13 So. 696 .....	9
Minn. etc. R. Co. v. Borum, 286 U.S. 447, 76 L. Ed. 1218..	27
Newkirk v. Los Angeles Junction Railway Co. (Calif.) 21 Cal. (2d) 308 .....	27

# TABLE OF AUTHORITIES CITED

iii

	Pages
Philadelphia V. & W. R. Co. v. Schubert, 224 U.S. 603, 56 L. Ed. 911 .....	24
Rief v. Great Northern Ry. (Minn. 1914) 148 N.W. 309....	8, 24
Robinson v. Baltimore & Ohio R. Co., 237 U.S. 84, 59 L. Ed. 849 .....	5
Shelton v. Thompson (7 Cir. 1945) 148 F. (2d) 1, 3.....	12
Southern Pacific v. Guthrie (9 Cir. 1950) 180 F. (2d) 295, 303 .....	29
Southern Pacific v. Guthrie (9 Cir. 1951) rehearing 186 F. (2d) 926 .....	29
Standard Oil Co. v. Anderson, 212 U.S. 215, 53 L. Ed. 480	5
Watkins v. Thompson, 72 F. Supp. 953 (E.D. Mo. 1947) .....	6, 7, 18, 22
Weisser v. Southern Pac. Ry. Co. (1906), 148 Cal. 426....	8

## Statutes

45 U.S.C.A., 51 .....	11
45 U.S.C.A., 55 .....	24



No. 13,078

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

---

SOUTHERN PACIFIC COMPANY,  
a corporation,

*Appellant,*

vs.

ROGER N. LIBBEY,

*Appellee.*

**On Appeal from the United States District Court for the  
Northern District of California, Southern Division.**

**BRIEF FOR APPELLEE.**

---

**I.**

**STATEMENT OF THE CASE.**

Appellee finds it necessary to augment, and in some particulars to correct, the statement of the case presented by appellant.

Plaintiff and appellee, Roger N. Libbey, applied to appellee Southern Pacific Company for the position of student fireman (R.46), was given a physical examination and approved and told to report for duty at appellee's railroad yard at Roseville, California where he was to act as a student fireman for two

weeks, and later if he qualified he was to go on the regular paylist (R.56). Appellee thereupon reported to the roundhouse foreman at Roseville who told him to keep his eyes and ears open and learn everything he could about being a fireman (R.57). He was also told to follow two engine fire lighters and learn to light engine fires. This he did in his first day's work (R. 57). Appellee was given by his foreman a document entitled "Authority to Pass and Instruct Student" (R.60) which provided that he be thoroughly instructed in the duties of the position named and requesting that he be "thoroughly acquainted \* \* \* not only with the duties of that position but of any other with which he may be entrusted or to which he may aspire" (R. 60). This form was signed by his foreman and stated: "engine or train, date from..... to ....., opinion as to fitness for position—learning."

On the second day of appellee's job as a student fireman on August 11, 1950, he was on the 3:59 P. M. to 11:59 P. M. shift after again reporting to his foreman who gave him no additional instruction (R. 61). On this day appellee worked with the fire lighters who were lighting fires on engines and by observing thus learned from the fire lighters, and during this time appellee lighted two fires on engines himself. When the fire lighters had finished their particular job they told appellee to stand around and watch and pick up whatever he could learn (R. 62). A hostler named Petersen then came along and advised appellee that he was going to move an engine and asked appellee if he would like to go with him (R. 63).



Appellee then got on an engine with Petersen with the purpose of trying to learn about the movement of the locomotive (R. 65). Appellee sat on the fireman's seat and watched the hostler, Petersen, move the engine. The door of the firebox of the engine was propped open in violation of the rules of the company at the time the hostler and appellee got on the engine. The hostler, however, negligently started the engine without closing the fire box door. When the engine moved a flashback of fire from the fire box caught the appellee while he was seated on the fireman's seat, burning the appellee's body and setting his clothes on fire. As the fire blocked appellee's way to the door of the engine cab, he jumped out the window of the cab and was severely and permanently injured (R. 66). Appellee sustained a compound, comminuted fracture of the right femur, with the fracture extending into the knee joint with a bowing of the femur (R. 126, 123, 128, 135). This injury has resulted in a permanent instability of appellee's right knee (R. 136, 137, 140). The uncontradicted medical testimony is that appellee permanently will be unable to engage in physical labor as a result of his accident (R. 138-140). Appellee's right knee is barely moveable (R. 126). He walks with a limp (R. 125) and has a shortening of his right leg (R. 136) and complains of pain while standing and walking (R. 139). These conditions are permanent (R. 140).

Appellee at the time of his injury was 27 years of age and had a life expectancy of 40.36 years (R. 211).

He quit school in his second year of high school (R. 78) and later engaged in jobs involving physical labor. Before his accident he made \$300.00 a month while working on vessels for the United States Army Transport Service, later worked in lumber mills and as a laborer, and in his last job before this accident was a mechanic's helper at McClelland Air Field averaging about \$190.00 a month (R. 104).

Appellee had injured his left leg by battle wounds while serving as a Marine in Guadalcanal, and again at sea several years before this accident, but was able to earn a living doing hard physical labor for several years before his railroad accident, and the condition of his left leg did not prevent him from working digging ditches and doing other hard physical labor. Appellee's Veteran's Disability Rating for the injury to his left leg had been cut down to 10% before his present injury (R. 169-170).

---

## II.

### **ARGUMENT.**

Appellant has assigned nine specifications of error which we shall discuss seriatim.

First, appellant contends that appellee was not an "employee" or engaged in interstate commerce within the meaning of the Federal Employer's Liability Act.

# A. APPELLEE WAS AN EMPLOYEE UNDER THE FEDERAL EMPLOYER'S LIABILITY ACT.

The Supreme Court has held that the term "employee" in the Federal Employer's Liability Act describes the conventional relation of master and servant, and that this relation is usually dependent upon the right to control and direct the manner in which the work should be done.

*Robinson v. Baltimore & Ohio R. Co.*, 237 U.S. 84, 59 L. Ed. 849;

*Hull v. Philadelphia & R.R. Co.*, 252 U.S. 475, 64 L. Ed. 670;

*Chicago, R. I. & P. R. Co. v. Bond*, 240 U.S. 449, 60 L. Ed. 735.

Another criterion used by the courts in order to determine the status of employee is by ascertaining whose work was being performed at the time of the injury.

*Linstead v. Chesapeake & Ohio R. Co.*, 276 U.S. 28, 72 L. Ed. 453.

The case of *Standard Oil Co. v. Anderson*, 212 U.S. 215, 53 L. Ed. 480, is a leading authority on this subject. In that case the court said:

"The master is the person in whose business he (the workman) is engaged at the time, and who has the right to control and direct his conduct."

In the *Anderson* case the court observes that many of the cases discuss the power of substitution or discharge, the payment of wages, and other circum-

stances bearing upon the relationship, but rules they, however, are not the ultimate facts, but only those more or less useful in determining whose is the work and whose is the power of control.

Several federal railroad decisions have recognized the rule announced in the authorities cited and hold that a servant or employee relationship results where a workman enters on a course of instruction with a railroad without compensation, and performs services including merely learning by observation as part of his instructions.

In the leading case on this subject, Judge Hulen, District Judge for the Eastern District of Missouri in the case of *Watkins v. Thompson* (1947) 72 F. Supp. 953, in a comprehensive decision has listed the leading cases in the nation on the subject of student employees under the Federal Employers' Liability Act. The *Watkins* case and the cases cited therein succinctly give the criteria as to what constitutes being an employee in the case of a student railroadman.

These criteria are:

1. The right of the railroad company to instruct the student as to how the work should be done.
2. The student's learning by observation which is held for the benefit of the railroad.
3. The railroad's expectation that the student would perform such tasks as were assigned to him by railroad employees.
4. That the student be subject to the orders and control of the railroad company.



In the *Watkins* case, *supra*, the plaintiff was a student yard clerk serving without compensation. Plaintiff was instructed to aid another employee in checking car numbers and seals. After finishing this work he went to a small house to get warm and then started walking through the railroad yard to continue checking. The student on his way back to work followed a yard clerk who went between cars of a train; the student followed. One issue of the case was what the yard clerk's instructions to plaintiff were about going through the train of cars. Plaintiff caught his foot on a coupler as the train moved and was thereby injured. The court held that the student was an employee under the Federal Employers' Liability Act as he was under the control and orders of the railroad company.

In *Huntzicher v. Ill. Central* (6 Cir. 1904) 129 F. 548, a student flagman was killed in a collision while sleeping in a caboose of a freight train after his active duties were done. The court held even though he was not actually working at the time of his death, still he was subject to the railroad's orders, even though his only duties were to learn by observation and to practice the duties of a flagman.

In *McMillan v. Grand Trunk R. Co.* (1 Cir. 1904) 130 F. 827 a student was told to watch couplings but not to go between cars. He did, however, go between cars and was injured. The court held that the student was an employee.



In *Rief v. Great Northern Ry.* (Minn. 1914) 148 N.W. 309, plaintiff, a student switchman, was not required by his contract to render any services yet the testimony showed that he was expected to perform and did perform, as part of his training, such tasks as were assigned to him by employees of defendant. The court held he was an employee.

In *Brown v. Chicago, R. I. & P. R. Co.* (Mo. 1926) 286 S.W. 45, 49, the court said:

“Applying the foregoing test to the facts in the instant case, there can be little, if any, doubt that appellant retained the right to direct the manner in which deceased Brown should do the work assigned to him by the engineer and fireman who accompanied him.”

The Supreme Court of California in *Weisser v. Southern Pac. Ry. Co.* (1906) 148 Cal. 426, held that a student brakeman who was entirely subject to the railroad's orders was an employee though he received no compensation.

In *Chesapeake & O. R. Co. v. Harmon's Adm'r* (Ky. 1916) 189 S.W. 1135, the court held that a student fireman who received no wages for his services and performed by virtue of a permit authorizing him to ride on the *engine only* was an employee while riding on the engine and entitled to a safe place to work.

The court said:

“What the student fireman is receiving and what the railroad company is receiving in return

is valuable. While the 'student' fireman is on the engine and performing the duties contemplated by the arrangement and within the scope of his duties under the arrangement, the railroad company certainly owes to him the same duties it owes to the regularly employed fireman of an engine in his employment."

The following cases have also held that student railroadmen without pay were employees.

*Millsaps v. Louisville N. O. & T. Ry. Co.* (Miss. 1891) 13 So. 696;

*Haluptzok v. Railway Co.* (Minn.) 57 N.W. 145;

*Atchison, T. & S. F. R. Co. v. Frouk* (Kan. 1906) 87 P. 698;

*Findley v. Coal & Coke Ry. Co.* (W. Va.) 87 S.E. 198.

Applying the uniform test enunciated in the foregoing cases to the facts in the instant case, there can be no doubt that appellant retained the right to direct the manner in which appellee should be occupied as a student fireman.

Appellee when he reported for duty at the railroad yard at Roseville was given a document entitled "Authority to Pass and Instruct Student" (Plaintiff's Exhibit 2—R.60), requiring him thoroughly to acquaint himself with the duties of his position, and the duties of any other position with which he may be entrusted or to which he may aspire. The position of fireman requires one to ride on engines and assist

the engineer. At Roseville the duties of hostler were conducted by firemen. Appellee's first assignment as a student fireman was to board engines and observe and help the fire lighters, as well as the general instruction to keep his eyes and ears open and learn all he could (R.57-62). Appellee lighted two fires himself (R.62) and later boarded the engine with hostler, or fireman (R.177), Petersen, at the latter's request, with the purpose of learning about the movement of the locomotive (R.65).

From the above it is obvious that appellee was acting in the scope of his employment as a student fireman, was working for the benefit of the railroad in learning by observation and incidentally assisted in the work himself by lighting fires, and was subject to the control of the appellant railroad company and subject to its orders and directions.

---

**B. APPELLEE WAS ENGAGING IN THE FURTHERANCE  
OF INTERSTATE COMMERCE.**

The testimony shows that appellee at the time of his injury was acting in the scope of his employment as a student fireman on appellant's Engine 2795, a consolidated switch and road engine (R.179). The testimony further shows that the engine was being taken at the time of appellee's accident from the roundhouse at Roseville to a preparatory track to be used that evening on a train called the Bowman Turn to pick up cars loaded with perishable fruits and vege-

tables to be returned to Roseville and then loaded into freight trains traveling in all directions throughout appellant's system, and thus going out of the State of California into other states (R.180-181-182-185-186).

The testimony further shows that appellee himself lit a fire on a mallet engine the day of his injury and also on a switch engine, and that the mallet engines are a bigger type that pull trains over the Sierras to Reno, in the State of Nevada (R.163).

The testimony in this case clearly showed that the Roseville yard of appellant is a central point on its line, where trains are broken up and made into other trains going into Nevada, Oregon and other points in interstate commerce (R.179).

In 1939 the Federal Employers' Liability Act (45 USCA 51) was amended to provide that any employee of a carrier any part of whose duties as such employee is in furtherance of interstate commerce or in any way directly, or closely and substantially, affects such commerce, was intended to include any employee who performs services which in any way furthers or affects interstate commerce, even if at the moment of injury he should not be engaged in interstate commerce. The actual wording of the broad and liberalizing 1939 amendment reads as follows:

“Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall in any way directly or closely and substantially affect such commerce as above set forth, shall, for the



purpose of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.”

Appellant in its brief cites a number of cases, all antedating the 1939 amendment and therefore not in point. Here we have a case where appellee was working at a central marshalling point on appellant's line where trains were broken up and remade to go out of the State of California into other states on the carrier's line. Appellee himself lit fires on engines, one of which we know to be a mountain mallet used to take trains over the mountains to Reno in the State of Nevada (R.178). Therefore, obviously, part of his duties was in the furtherance of interstate commerce and doing work closely affecting such commerce.

The following cases clearly demonstrate that the words “furtherance of interstate commerce” is elastic enough to embrace the situation in the case at bar.

*Shelton v. Thompson* (7 Cir. 1945) 148 F.2d 1, 3;

*Edwards v. Baltimore & Ohio R. Co.* (7 Cir.) 131 F.2d 366;

*Kach v. Monessen Southwestern Ry. Co.* (3 Cir.) 151 F.2d 400.

At least one of the engines, the mallet, on which appellee lit a fire, was used in interstate commerce. That is sufficient under the Act. In the *Shelton* case, *supra*, the plaintiff operated a crane in the railroad's storehouse lifting wheels of cars, some of which were



used in intrastate commerce and some in interstate commerce. However, no one knew where the wheel being lifted at the time of the accident would be used. The court held the movement as interstate, despite the fact that no witness could tell whether the wheel being lifted would be used on an interstate car, and that as some wheels obviously must be used in interstate commerce the court said:

“Appellant argues that plaintiff, employed in the railroad’s storehouse, operating a crane which hoisted car wheels into position for repair on freight trains, some of which were used in intra- and others in inter-state commerce, was not one who could conceivably be said to be engaged in interstate commerce.

“However, we have before us, for construction, the amended act, not the original section. There can be no doubt but that the amendment was intended to broaden the scope of the Act to include employees whose work was related to the functioning of interstate commerce. Concededly the relationship between the encompassed occupations and the actual transportation in interstate commerce has become more tenuous as this law has developed. It was this fact, no doubt, that caused Congress to enlarge the scope of the Act by stating that all employment in ‘*furtherance* of interstate \* \* \* commerce’ are within the Act. The word ‘*furtherance*’ is a comprehensive term. Its periphery may be vague, but admittedly it is both large and elastic. It would not be an undue stretching of it to hold that one who is engaged with others in the process of repairing the car so that it may thereafter be moved in interstate

(or by happenstance in intrastate) commerce, is engaged in an occupation 'in furtherance' of interstate commerce.

"A car cannot travel even in interstate commerce, without wheels. Ordinarily a car is as usable in interstate as in intrastate commerce. The same crane which plaintiff operated, moved many articles. Some were used on cars which moved in interstate commerce. No one in the employ knew where the car wheel would be used. Perhaps the success of the repair efforts would determine its future use.

"The report of the Senatorial Committee indicates that the amendment was intended to extend the application of the Federal Employers' Liability Act to employees, like plaintiff, who are engaged in work which left them and their attorneys in deepest doubt as to the law which governed their employers' liability and their right to recover damages for injuries which they might receive. The amendment was, we believe, a much needed one—and the selection of the phrase '*furtherance* of interstate \* \*\* commerce' to accomplish the purpose of clarification, an effective and purposeful one."

The issue of interstate commerce was presented to the jury and determined by it.

**C. APPELLEE WAS IN THE SCOPE OF HIS EMPLOYMENT WHEN ON THE ENGINE AT THE TIME OF HIS INJURY AND DID NOT DEVIATE FROM HIS DUTY.**

Appellee will here answer appellant's specification of errors numbered 2, 3, and 4 as each of these specifications covers the same point, namely, appellant's contention that appellee at the time of his injury deviated from his employment and instructions when he boarded the engine with the hostler. Appellant contends there was a departure from the employment at the time of injury and that its proposed instructions No. 22 and No. 23 (R.26-27) on the question of deviation should have been given to the jury.

The court in refusing to give these two instructions correctly stated that there was no evidence in the case to warrant presenting a question of deviation to the jury. The court said:

"I purposely did not give those instructions and you may have it for the record so that you may have it for your protection as well, because I did not feel the facts of this particular case justified the giving of that instruction, not because I had any particular quarrel with that as a statement." (R.291).

There is absolutely no evidence warranting appellant's proposed instructions No. 22 and No. 23, and it would have been prejudicial error for the court to have given them to the jury. Let us examine these instructions. Appellant's proposed instruction No. 22 reads as follows:

“Even if plaintiff is considered as having been employed by the defendant when he went upon the defendant’s premises as a student fireman because he performed service for the defendant, still if you find that under the instructions of the foreman in charge the plaintiff on the shift on which the accident happened was instructed to accompany the fire lighters and learn to light fires and for his own benefit and convenience and his own interest and without any instructions from defendant, and not for the purpose of performing any service for the defendant, deviated from the line of activity designated for him on his shift and went upon the locomotive, he then departed from the course and scope of any employment, and if he was injured while he was so in the course of departure, your verdict must be in favor of defendant Southern Pacific Company.”

Appellant would have this court believe that the only instruction to appellee required him slavishly to follow the fire lighters even after the fire lighters’ work had terminated, or for the appellant to then remain idle for the remaining hours of his shift. Actually, the instructions to appellee were both written and oral. The written instructions (R.60) required that he be *thoroughly* acquainted with the duties of a fireman and any other job to which appellee might aspire. The duties of a fireman require not only the lighting of fires on engines but to assist in the operation of a moving engine. On appellee’s first day’s work his general written instructions were augmented orally by the foreman when he told appellee to follow



the fire lighters and to keep his eyes and ears open and learn all he could about the duties of a fireman (R.57). This indeed was a broad charter thoroughly to learn the full duties of a student fireman.

On his second day of employment he received no instructions from the foreman, and again he followed the fire lighters, learning their duties by observation and then actually lighting two fires himself. He continued aiding them until the fire lighters finished their work when they told appellee to stand around and watch and pick up whatever he could learn (R.62).

Up to this point for two days appellee had done all his work in the cabs of various engines observing and lighting fires, and was then told all the engines had been fired and were ready (R.62). It was then before 10:30 p. m. and appellee's shift did not expire until 11:59 p. m. and he was told again to watch and pick up all he could learn. Remember appellee's written instructions had specifically ordered him thoroughly to become acquainted with the duties of a fireman, and that is exactly what he was doing when he went on the engine with the hostler. Counsel for appellant would have appellee, a student fireman, do nothing until the end of his shift rather than comply with his written instructions thoroughly to become acquainted with his duties as a fireman.

At the request of the hostler, Petersen, appellee boarded the engine with the hostler in order to observe and learn a fireman's duties on the engine. What a straining and laboring of fact and truth to contend



such action of appellee was a deviation or departure from the scope of his duties.

The proposed instruction would have informed the jury that if they found that appellee went upon the engine for his own benefit and in his own interest that he then had departed from the scope of his employment. Yet, there is not an iota of testimony that appellee went on the engine in his own interest, as he stated in his uncontradicted testimony that he boarded the engine with the hostler in order to learn something he hadn't learned before, including not only the firing but the operation of the engine (R.87). It is respectfully submitted that appellee's very job of student fireman required him to learn for the benefit of the railroad company, and that the very purpose of the railroad company appointing him as a student fireman embraced this concept.

The doctrine of the *Watkins* case (*supra*) enunciates this very rule. It, therefore, would have been error for the jury to speculate contrary to the uncontradicted evidence that appellee at the time of his injury was on the engine on an errand of his own.

Appellant's proposed instruction No. 23 would again have the jury determine contrary to the evidence the question whether the hostler's request to appellee was solely in order for appellee to observe the operation of the locomotive for his own benefit and also to determine the further question whether the hostler's request in any way modified earlier and

contrary instructions. There is absolutely no evidence of any contrary instructions to appellee. The oral instruction of the previous day to follow the fire lighters was only a partial instruction and embraced a specific request under the general comprehensive written instruction thoroughly to be acquainted with the duties of a fireman. The foreman orally told him *also* to learn all he could about his job. The evidence discloses that in Roseville the duties of hostler were conducted by firemen (R.177-178), and that the hostler Petersen had student firemen with him on the road on several engine trips (R.189). The testimony shows that as appellee had completed his two shifts with the fire lighters he was ready to start his road trips or yard trips in engines (R.188).

Petersen, the hostler, informed appellee that he was taking the locomotive out of the roundhouse in order to spot it on one of the tracks and asked appellee to come along. In order to observe and learn his job appellee did so. Where is there any deviation in doing what he was supposed to do on appellant's yard, namely, to learn by observation for the company's benefit? Under the broad written and verbal charter that he had received appellee had the right to learn everything he could about being a fireman. One of the things he had to learn was how to take an engine out of the roundhouse as a hostler and spot it and also to observe how an engine should be operated.

The additional vice of appellant's two proposed instructions is that they would have the jury believe

contrary to any evidence that appellee was forbidden to go on the engine.

Appellant's contention of deviation or departure from the scope of his employment is sustained neither from the facts nor the law he cites.

Appellant seems to lean heavily on the case of *Chesapeake & O. Ry. Co. v. Harmon's Adm'r* (Ky. 1916) 189 S.W. 1136, which counsel for appellant himself admits "is radically different on the facts concededly" (R.299). In that case a student fireman had a written permit allowing him to ride on engines of defendant railroad company. He worked on an engine assisting the engineer during a trip, but on a return trip went into the caboose of the train to rest and sleep contrary to orders of the train conductor who informed plaintiff he had no right to stay in the caboose. The engineer also sent word through the conductor to plaintiff in the caboose that he needed his assistance on the engine, but plaintiff flatly refused to go back to his duties. He was killed while sleeping in the caboose where he did not belong and where he was in willful violation of orders after refusing to do the duties assigned to him. The court therein said:

"It is apparent that he could not perform any of the duties of his position while riding or sleeping in the caboose \* \* \*. There is no sufficient reason shown why he was refusing to perform the duties expected of him, except his own pleasure, and since the evening before, he had not been engaged in the service of the appellant."

The court held against plaintiff in the *Harmon* case because of Harmon's direct refusal to work and his express refusal to leave the caboose when ordered out. Hence the facts of the *Harmon* case have absolutely no bearing on the case at bar.

Appellant also cites a number of workmen's compensation cases which hold that being injured while skylarking, at lunch, or on personal business is a deviation from the scope of one's employment. Frankly, appellee has no quarrel with appellant's cases on the subject of deviation or departure from duty as mere statements of law, but submits there is not the slightest applicability of the rulings in those cases to the facts herein.

The holding in the *Harmon* case, *supra*, was against the plaintiff only because he actively and willfully disobeyed positive orders and not because the student was in the caboose. This distinction is clearly drawn in the case of *Huntzicher v. Ill. Central Ry.* (6 Cir. 1904) 129 F. 548, where a student flagman was authorized to go on the road and there learn by observation and practice the duties of a flagman. He was killed, while asleep in the caboose, by a rear end collision. None of the student's duties required his presence in the caboose, but he had obtained the conductor's permission to rest there. The railroad company contended the student was not an employee at the time of his death because he was in the caboose. The court held the student an employee and said:

“He was under the control of the defendant, and the company would undoubtedly have been



responsible for the manner in which he performed his service; and what is more important, under the test above stated he had no interest whatever, other than that which any servant has in the result of his service, in the consequence of the discharge of his duties.”

There are several other cases involving student railroadmen holding them employees even where they were not actually performing their assigned work at the moment of their injury, as long as they were on the railroad company's yards and generally had been performing their duties as students.

*Watkins v. Thompson* (Mo. 1947) 72 F. Supp. 953;

*Brown v. Chicago etc. R. Co.* (Mo. 1926) 286 S.W. 45.

The facts in the case at bar are much stronger than even the *Watkins*, *Brown* and *Huntzicher* cases, supra, in that at the very moment of his injury appellee was performing his assigned duty of learning by observation the duties of a fireman on an engine. He was actually being instructed as a student fireman.

---

#### D. THE COURT PROPERLY EXCLUDED THE VOID CONTRACT AND IMMATERIAL RULES.

Appellee will here briefly discuss appellant's Specifications of Error Nos. 5, 6, 7 and 8. Specification No. 5 contends the Court should have admitted into evidence Rule 864 of the appellant's Rules and Regu-



lations of the Transportation Department, which reads:

“Persons must not be permitted to ride on an engine or in a baggage, mail or express car without a written order from the proper authority, except employees in the discharge of their duties and those holding transportation endorsed to that effect.”

Appellee respectfully submits that even a casual perusal of the rule shows its immateriality. In effect the rule says that outsiders shall not ride on engines and cars without written authority and then the rule expressly excepts “employees in the discharge of their duties”. If appellee is legally an employee then obviously the rule does not apply and the very issue determined by the jury was his employee status. The trial court observed that to contend the rule applied under the facts of *this case* would be a forced and unfair interpretation.

Appellant’s Assignment of Error No. 6 refers to the Court’s refusal to allow the introduction of a document printed on page 25 of the record, which document constitutes a waiver of liability by appellee and an express assumption of risk by appellee. This type of contract is against the policy of the law and is illegal and void under Section 5 of the Employers’ Liability Act, and therefore its introduction was rightfully refused by the Court.

The issue presented to the jury herein was whether appellee was an “employee” under the Federal Em-

ployers' Liability Act at the time of his injury, and if the jury so found, as they did, such an agreement would be void. If the jury had determined appellee not to be an employee under the Act, appellee's case would have failed.

Section 5 of the Act reads as follows:

"Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void \* \* \*."

45 U.S.C.A. 55;

*Philadelphia B. & W. R. Co. v. Schubert*, 224 U.S. 603 (56 L. Ed. 911);

*Duncan v. Thompson*, 315 U.S. 1, 86 L. Ed. 575;

*Rief v. Great Northern Ry.* (Minn. 1914) 148 N.W. 309.

Appellant's Assignment of Error No. 7 was an offer by appellant to introduce a fireman's agreement which appellant's counsel admitted was not by its terms applicable to appellee nor signed by appellee. The Court rightfully sustained the objection that an agreement not applicable to appellee would be incompetent, irrelevant and immaterial and self serving. The Court stated it would accept independent testimony as to appellee's status but not allow the introduction of an inapplicable contract.

Appellant's Specification of Error No. 8 contends the Court erred in rejecting appellant's question to Dr. Cress that if he had known of appellee's war

injury would he have permitted appellee to act as a student fireman? Appellant objected to this question on the grounds that the question called for a self-serving declaration on the part of the railroad company by its doctor and also that it was an attempt to impeach the doctor's own testimony that he had examined applicant and approved him for service with knowledge of his prior injuries and knowledge of his prior fracture. The Court thereupon made its ruling, saying:

“Well. I think that this is not the field, Mr. Dunne, for expert testimony. The casual\* (*causal*) relation of this man to the employment is a factual question for the jury to decide. I don't see that it is possible for expert testimony on the part of the examining doctor; it would result in opinion and a conclusion which would be self serving and would decide the matter rather than leaving it as a question of fact. I will sustain the objection.”

The record shows that the examining doctor, Dr. Cress, knew that appellee had had a compound fracture of his other or left leg prior to accepting appellee as physically fit for service as a student fireman (R. 263).

The issue as to any fraud or misrepresentation was put to the jury, as follows, in the Court's instructions (R.281):

“There is another matter that you will have to determine in this case that affects the right of

---

\*The Reporter used the word casual instead of causal in quoting from the judge's instructions.

the plaintiff to recover and that is the defense that was urged by defense counsel, namely, that this plaintiff misrepresented his physical condition and falsely stated it and the defense is that by virtue of that fact he is debarred from claiming the benefits of this statute.

Now, you should examine the evidence in that regard and (268) you should determine first whether or not the statements alleged to have been made by the plaintiff at the time he was examined were or were not false. If you determine that they were not false, then there is no need to pursue your inquiry any further, that defense will have failed. If, on the other hand, you determine that those statements made were false, then the next thing is to determine whether or not that caused any damage or change of position so far as the defendant was concerned, whether or not the defendant lost thereby the right to exercise the judgment as to whether or not the plaintiff should be employed or not. And you also have to further consider whether or not, even if that were so, whether or not there is any casual\* (*causal*) connection between the nature of the false statement, if it be a false statement, and the accident itself. If there be no casual\* (*causal*) relationship between the two, then of course it cannot be said that the defendant suffered any particular harm because of the false representation."

In this instruction the Court left it to the jury to determine if plaintiff had misrepresented his physi-

---

\*The Reporter used the word casual instead of causal in quoting from the judge's instructions.



cal condition, and that if he had, whether defendant was damaged thereby and whether there was any causal connection between any false statement, if any, and the accident itself.

It is submitted that the Court's instruction to the jury correctly followed the rule of law enunciated in the following cases, that fraud or misrepresentation in obtaining employment does not bar recovery under the Employers' Liability Act unless there be some causal connection between the misrepresentation and the accident, and furthermore that if a railroad company or its authorities have knowledge of the alleged misrepresentation before the accident, it is waived. The following cases hold the question of fraud is one for the jury:

*Minn. etc. R. Co. v. Borum*, 286 U.S. 447, 76 L. Ed. 1218;

*Blanton v. Northern Pac. Ry. Co.* (Minn.) 10 N.W. (2d) 382;

*Kenny v. Union Railway Co. of N. Y.*, 152 N.Y.S. 117;

*Hart v. New York C. & H. RR Co.* (N.Y.) 98 N.E. 493;

*Newkirk v. Los Angeles Junction Railway Co.* (Calif.) 21 Cal. (2d) 308.

**The verdict is not excessive.**

Appellee, it is true, suffered a fractured left leg when wounded during the war, but he had recovered from that wound sufficiently so that he was receiving only a 10% disability rating. He was able for several



years, before his railroad accident, to earn his living by hard physical work making an average of \$300 a month when in the Army Transport Service, and he averaged \$190 a month during the half year before his railroad accident. At \$300 a month the present value of his future earnings discounted at a 3% basis would be \$82,800. The jury brought in a verdict of \$50,000. The lower figure of \$190 a month, which he earned as an airplane mechanic, discounted at the same 3% basis, would exceed the \$50,000 verdict, to-wit: \$52,440. Appellee's life expectancy at the time of his injury was 40.36 years.

The medical testimony is uncontroverted that appellee is permanently and totally disabled from ever engaging in physical labor.

The present value of his future earnings exceed the verdict without considering general damages for appellee's pain and suffering.

A motion for a new trial, including the ground of alleged excessiveness of the verdict and covering as grounds all other points raised by this appeal, was denied.

There is no abuse of legal discretion by the trial judge in denying the motion for a new trial, nor is there evidence of passion or prejudice in the record. Appellee submits that the verdict is not monstrous in the circumstances.

*Affolder v. N. Y. Chi. & St. L. Ry. Co.*, 339  
U.S. 96, 94 L. Ed. 683;

*Southern Pacific v. Guthrie*, 180 F. (2d) 295,  
303;

*Southern Pacific v. Guthrie*, 186 F. (2d) 926  
(rehearing).

Appellee respectfully submits that the judgment  
below should be affirmed.

Dated, San Francisco, California,  
December 14, 1951.

DANIEL V. RYAN,  
THOMAS C. RYAN,  
RYAN & RYAN,

*Attorneys for Appellee.*



No. 13,078

IN THE  
United States  
Court of Appeals  
For the Ninth Circuit

---

SOUTHERN PACIFIC COMPANY, a corporation,  
*Appellant,*

vs.

ROGER N. LIBBEY,

*Appellee.*

---

APPELLANT'S REPLY BRIEF

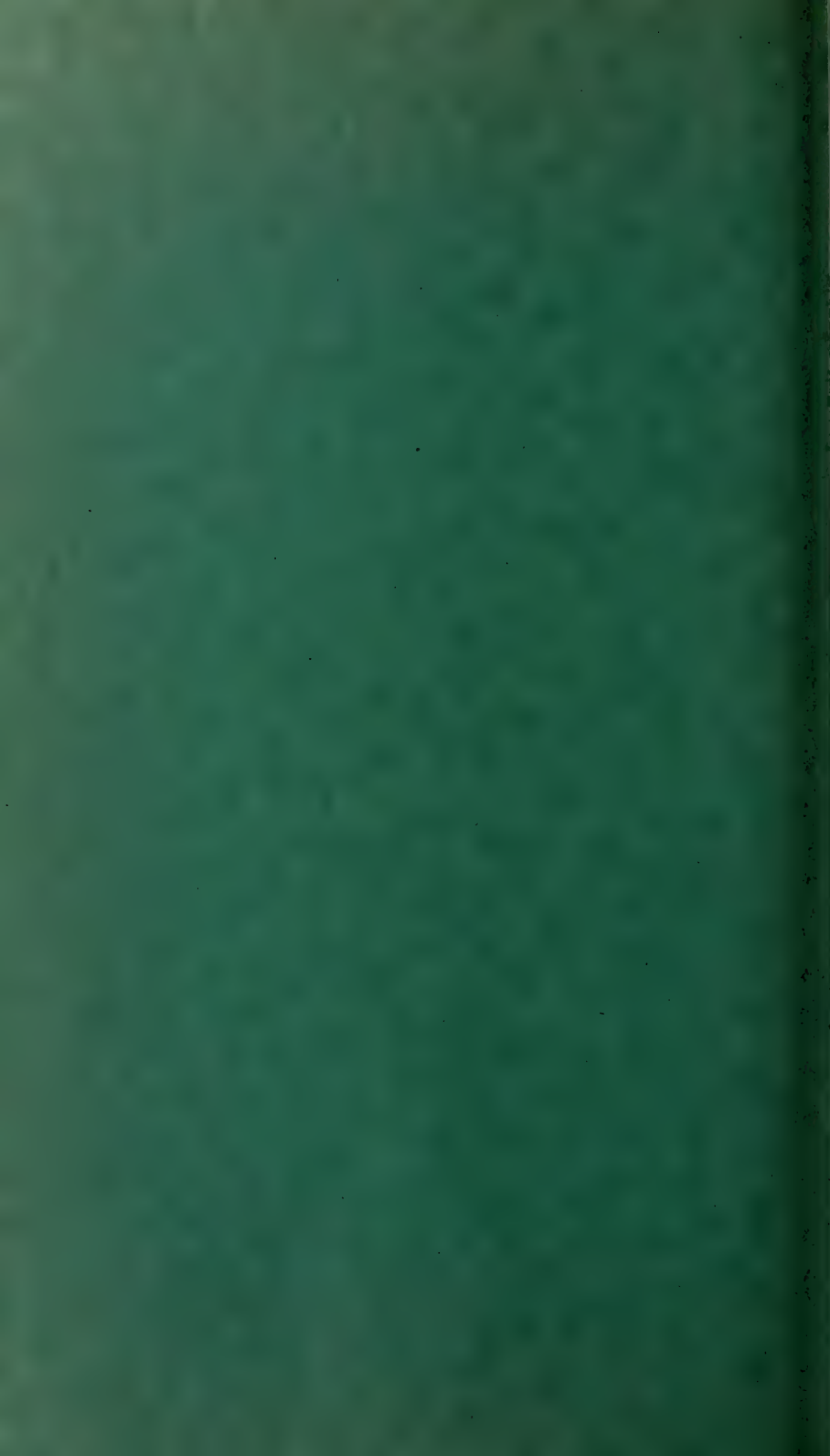
---

ARTHUR B. DUNNE  
DUNNE, DUNNE & PHELPS  
333 Montgomery Street  
San Francisco 4, California

*Attorneys for Appellant*

DEC 21 1951

PAUL P. O'BRIEN





## TABLE OF AUTHORITIES

CASES	Pages
Chicago etc. Co. v. Bolle, 284 U.S. 74, 76 L.ed. 173.....	3
Chicago etc. Co. v. Ind. Com'n, 284 U.S. 296, 76 L.ed. 304.....	3
Edwards v. B. & O. R. Co., 131 F.2d 366 (Circ. 7).....	5
Ermin v. Penn. R. Co., 36 F. Supp. 936, 938 (E.D.N.Y.).....	4
Francis v. S. P. Co., 333 U.S. 445, 449, 92 L.ed. 798, 803.....	3
Hallaway v. Thompson, 148 Tex. 471, 226 S.W.2d 816.....	4
Haluttzok v. Gt. N. Ry. Co., 55 Minn. 446, 57 N.W. 144.....	1
Holl v. So. Pac. Co., 71 F. Supp. 21 (N.D. Cal.).....	4
I. A. C. v. Davis, 259 U.S. 182, 66 L.ed. 888.....	3
Kach v. Monessen etc. Co., 171 F.2d 400 (Circ. 3).....	5
New York etc. Co. v. Bezue, 284 U.S. 415, 76 L.ed. 370.....	3
Overstreet v. North Shore Corp., 318 U.S. 125, 131, 87 L.ed. 656, 652.....	3
Shanks v. Delaware etc. Co., 239 U.S. 556, 60 L.ed. 436.....	3
Shelton v. Thomson, 148 F.2d 1 (Circ. 7).....	5
Shoenfelt v. Penn. R. Co., 69 F. Supp. 728 (S.D.N.Y.).....	4
So. Pac. Co. v. I. A. C., 19 C.2d 271, 120 P.2d 880.....	5
Thompson v. Ind. Com'n, 380 Ill. 386, 44 N.E.2d 19, cert. den. 318 U.S. 755, 87 L.ed. 1129.....	4
United States v. C. I. O., 335 U.S. 106, 112, 92 L.ed. 1849, 1856	3

## STATUTES

Fair Labor Standards Act.....	4
Federal Employers' Liability Act.....	1, 2, 3, 4

## TEXTS

10 A.L.R.2d 1279.....	3
16 A.L.R.2d 3ff 249.....	6



No. 13,078

IN THE

United States  
Court of Appeals

For the Ninth Circuit

---

---

SOUTHERN PACIFIC COMPANY, a corporation,	}
<i>Appellant,</i>	

vs.

ROGER N. LIBBEY,

<i>Appellee.</i>	}
------------------	---

---

APPELLANT'S REPLY BRIEF

---

Appellee's brief calls for a little comment.

The first point we made was that appellee was not an "employee" within the meaning of the Federal Employers' Liability Act. The only response is an understatement, resulting, in effect, in a misstatement, of the facts and the citation of some cases, all of which were dealt with in our brief except *Haluttzok v. Gt. N. Ry Co.*, 55 Minn. 446, 57 N.W. 144. That case was not under the Federal Employers' Liability Act. It was not one of liability to a servant for injury. It was the case of a volunteer, at the time actually doing defendant's work,—handling a hand truck to carry freight. The case was put on the ground of an actual em-

ployment of an assistant by a servant of the defendant under an implied authority. Whatever else need be said on this point will be found in our opening brief.

In connection with this subject we urged error in the exclusion of evidence. The only attempted answer is to say that the agreement offered was void under the Federal Employers' Liability Act. The proposition can be made only if it first be assumed that appellee was an employee. The argument is a circle. It first assumes the answer to the question and then justifies the answer on the basis of its own assumption. Whether the agreement, as such, was void or not is beside the point. It was not offered for the purpose of having it enforced. It was offered solely for the purpose of showing the relationship of the parties. However void an agreement may be its recital can still be evidence of a fact. The firemen's agreement was offered for the same purpose. The comments made fail to meet the proposition that when the question is one of relationship of the parties, either side is entitled to show all of the relevant circumstances, whether they bear on the relationship directly or are simply ground for an inference.

On the matter of interstate commerce one or two comments must be made. It is said the locomotive from which appellee jumped was to go out on the "Bowman turn" and that this train handled cars loaded with freight to travel in all directions and thus go out of the state of California. The simple answer is that there was no such showing. The showing was that on the Bowman turn cars were delivered and other cars were picked up; that some of the cars contained perishables. **Nothing more is shown** except that Roseville, for some unidentified cars, was a junction point from which interstate trains left and into which they came. Appellee was not shown to have ever had any connection with any

such trains or any cars or any equipment moving in interstate commerce or handling any such trains. Certainly nothing he did was in furtherance of any such business. Nor did it "directly or closely and substantially, affect" any such activity.

It is not questioned that appellee would not have come under the Federal Employers' Liability Act prior to the amendment in 1939. No serious attempt is made to show why, for his case, the amendment made any change. Certainly no case has been decided under the amendment which remotely approaches this one. If the Court wants to examine the cases they will be found collected in an extensive note in 10 A.L.R.2d 1279. They all have to do with men actively engaged in handling the equipment, repairing the equipment, working on the right of way, working on permanent structures and the like, all of which were used, in part at least, for interstate transportation.

Before the 1939 amendment it had been established definitely that interstate commerce under the Act was interstate **transportation** or work so closely related to it as to be practically a part of it. (*Shanks v. Delaware etc. Co.*, 239 U.S. 556, 60 L.ed. 436; *I. A. C. v. Davis*, 259 U.S. 182, 66 L.ed. 888; *Chicago etc. Co. v. Bolle*, 284 U.S. 74, 76 L.ed. 173; *Chicago etc. Co. v. Ind. Com'n*, 284 U.S. 296, 76 L.ed. 304; *New York etc. Co. v. Bezue*, 284 U.S. 415, 76 L.ed. 370.) The 1939 amendment did not disturb the portion of the Act under which these cases were decided; to the contrary it re-enacted it. In doing so Congress had in mind the construction already given (*Overstreet v. North Shore Corp.*, 318 U.S. 125, 131, 87 L.ed. 656, 652; *United States v. C. I. O.*, 335 U.S. 106, 112, 92 L.ed. 1849, 1856; *Francis v. S. P. Co.*, 333 U.S. 445, 449, 92 L.ed. 798, 803). Indeed, as the *Overstreet*



*Case* holds, when Congress used the term "interstate commerce" in the Fair Labor Standards Act, it did so with knowledge of the definition given in the cases of the Federal Employers' Liability Act, and used the term as so defined. *A fortiori* this is true of the Federal Employers' Liability Act itself when it was re-enacted without change.

Interstate commerce is still interstate **transportation** for work so closely related to it as to be practically a part of it. Nothing that appellee did came within this. By the 1939 amendment the Act was extended to work which furthered interstate commerce. But nothing which appellee was doing furthered any interstate transportation. He was preparing himself to work as a fireman. What he might do in the future might further interstate transportation. But what he was doing at the moment did not. Nor did it affect interstate transportation "directly or closely and substantially." It is interesting to notice that these words were not in the amendment as originally proposed. Originally the amendment was to cover any employee whose work "in any way" affected interstate transportation. In the course of adoption the language was changed by substituting "in any way **directly or closely and substantially.**" (See *Ermin v. Penn. R. Co.*, 36 F. Supp. 936, 938 (E.D.N.Y.)) The words were introduced as a definite limitation and they must be given the effect intended by Congress.

It is submitted that in this case no more was shown than was shown in *Shoenfelt v. Penn. R. Co.*, 69 F. Supp. 728 (S.D.N.Y.); *Hallaway v. Thompson*, 148 Tex. 471, 226 S.W. 2d 816; or *Thompson v. Ind. Com'n*, 380 Ill. 386, 44 N.E.2d 19, cert. den. 318 U.S. 755, 87 L.ed. 1129. *Holl v. So. Pac. Co.*, 71 F. Supp. 21 (N.D. Cal.) pointed out that the line dividing employees of a railroad who fall under the Act

and who do not fall under the Act had been moved by the 1939 amendment, **but the line must still be drawn.** All employees do not fall within the Act.

The three cases cited by appellee call for a little comment. *Shelton v. Thomson*, 148 F.2d 1 (Circ. 7) was treated by the Court as the case of an employee repairing cars,—he was a crane operator “who is engaged in the process of repairing cars.” *Edwards v. B. & O. R. Co.*, 131 F.2d 366 (Circ. 7) was another case of repairing equipment. *Kach v. Monessen etc. Co.*, 171 F.2d 400 (Circ. 3), was a case of a member of a switching crew, one of the very classes specifically designated for inclusion in the Senate Committee Report dealing with the 1939 amendment (see *So. Pac. Co. v. I. A. C.*, 19 C.2d 271, 120 P.2d 880).

We argued that it was a question which should have been submitted to the jury whether, if appellee were an employee he had so far departed from the course and scope of his employment as no longer to be entitled to the benefits of the Act. The attempted reply calls for little comment. It is an argument which properly could be addressed to a jury. It suggests interpretations of the evidence and suggests things which might be found as a matter of fact. There is nothing in it to support a ruling that **as matter of law** appellee had not departed from the course and scope of his assumed employment and had not departed from his instructions. The matter is covered in our brief.

On the issue of fraud we pointed out that the Court erred in excluding evidence which went to the matter of reliance and materiality of the misrepresentation. It is no answer that the instructions of the Court were correct. Nor is it an answer that the matter was submitted to the jury. These things can always be said when evidence is improperly

excluded. A party is entitled to have his case submitted to the jury with all of the evidence that properly should be before it. There is no attempt to meet the showing made in our brief that evidence such as was offered from the doctor and was excluded is proper, material and relevant.

On the matter of the amount of damages there can be added to the collections of cases referred to on page 60 of our brief the note in 16 A.L.R. 2d 3ff especially at 249.

Only one or two comments on the attempted reply are called for. It is wholly inadmissible to use a figure of \$300 per month as a basis of earnings for appellee. This was before appellee went into civilian service and includes bonuses for overseas pay in hostile waters. It is equally inadmissible to use the figure of \$190 a month. Whether appellee's incapacity is permanent or not, it certainly is not total. On the very figures used, even if his incapacity could be said to be 50 per cent as a result of this accident and because of injury to his legs (ignoring for the moment the contributing factor of the injury to his other leg) in percentages it certainly could not exceed 50 per cent. There is no disability except in the legs. The upper extremities have all their original usefulness. On appellee's own figures there is a demonstration that the award is double what it should have been.

It is respectfully submitted that the judgment should be reversed.

Dated at San Francisco, California, December 24, 1951.

ARTHUR B. DUNNE  
DUNNE, DUNNE & PHELPS

*Attorneys for Appellant*













